PP

v.

DATO' SERI ANWAR IBRAHIM

COURT OF APPEAL, PUTRAJAYA
BALIA YUSOF WAHI JCA
AZIAH ALI JCA
MOHD ZAWAWI SALLEH JCA
[CRIMINAL APPEAL NO: W-05-19-01-2012]
11 APRIL 2014

CRIMINAL LAW: *Penal Code - Section 377B - Carnal intercourse against the order of nature - Acquittal and discharge - Appeal against - Decision by trial court - Expert evidence - Whether credibility of evidence taken into consideration - Whether experts' evidence tested against other evidence and facts - Whether exhibits tampered with - Whether trial judge undertook a critical evaluation of evidence - Whether ample evidence existed to convict accused*

EVIDENCE: *Expert evidence - Credibility - Whether trial court took into account credibility of witness - Whether experts' evidence tested against other evidence and facts - Whether exhibits tampered with - Whether trial judge undertook a critical evaluation of evidence - Whether ample evidence existed to convict accused*

The respondent was charged in the High Court with committing sodomy on his personal assistant ('PW1') when the latter came to deliver documents to him at a condominium. Two days after the incident, PW1 went to Hospital Kuala Lumpur ('HKL') where he lodged a police report and was examined by three doctors who took swabs from his private parts and other areas of his body. The swabs were each put into separate containers, sealed and labelled by one of the three doctors before all the containers were put into a transparent plastic bag ('P27') and handed over to the investigating officer of the case, PW25, the following day. A day after receiving P27, PW25 cut it open, removed the individual containers containing the swabs and put them each into separate envelopes before sending them to a chemist, PW5, at the chemistry department who tested and found semen and sperm cells on four of the swabs. In her report, PW5 said that the DNA profiles found on the swabs belonged to PW1 and another unidentified male person. About 16 days later, after the respondent was detained in a police lock-up cell alone in

connection with PW1's police report, the police sent sealed envelopes containing items the respondent had used while in his cell to PW25 who, in turn, sent them to another chemist, PW6, at the chemistry department. After finding that the items contained the respondent's DNA, PW6 compared her results with the tests done by PW5 earlier and found that the DNA profile of the unidentified male in PW5's tests on the swabs matched the respondent's. Finding that the prosecution had proved a *prima facie* case against the respondent, the trial judge called on the respondent to enter his defence. Although the respondent had given the prosecution advance notice that he would be raising the defence of alibi, that defence was abandoned and the respondent elected to give an unsworn statement from the dock and called seven witnesses to support his case. Among them were two experts, DW2 and DW4, who criticised the alleged deficiencies, and the conclusions made, in the report prepared by the three doctors at HKL as well as the analysis done by PW5 and PW6. According to DW2 and DW4, the way in which the test samples were stored (*ie*, in a steel cabinet and not in a freezer), the amount of time that elapsed between the alleged sodomy and the DNA testing and the length of time the sperm cells were in PW1's rectum before they were retrieved - all these would have had the cumulative effect of degrading the samples to such an extent that no conclusive DNA profiling could have been made. DW2 even suggested that the samples might have been tampered with and that the respondent's DNA could have been planted. Although the trial judge found the respondent's statement from the dock to be a mere denial of the charge, upon the evidence of DW2 and DW4, the judge concluded that the results of PW5's analysis could not be reconciled with the evidence of DW2 and DW4, such that a reasonable doubt had been raised by the defence on the prosecution's case. The respondent was acquitted and discharged at the end of the trial, thereby prompting the instant appeal.

Held (allowing appeal; setting aside decision of the High Court; convicting and sentencing respondent to five years' jail)

Per Balia Yusof Wahi, Aziah Ali, Mohd Zawawi Salleh JJCA:

(1) The comments and criticisms by DW2 and DW4 pertaining to the evidence of PW5 and PW6 on their analysis and as to the conclusions reached by the three HKL doctors in their report

in exh. P22 had no probative value as to cast a reasonable doubt on the prosecution's case. The trial judge erred in concluding that the evidence of DW2 and DW4 showed the possibility of the samples taken from PW1 to have been compromised and the results of the DNA analysis by PW5 to be unsafe to be relied upon. (para 150)

(2) The trial judge failed to consider that PW5's evidence was more credible in the sense that she herself had carried out the various tests and analysis of the samples as opposed to DW2 and DW4 who were mere 'arm chair experts' and did not have the benefit of doing the analysis themselves. The evidence of DW2 and DW4 were mere opinion and their conclusions were derived mainly from textbooks and journals, as opposed to the evidence of PW5 and PW6 which was factual and based on their own analysis of the samples. The trial judge had found both PW5 and PW6 to be highly qualified in their area of expertise. (paras 130 & 132)

(3) On the method of analysis, the trial judge accepted that PW5 had conducted the DNA analysis using the latest technique. DW4, on the other hand, last did the DNA analysis in 2004 and his expertise seemed to be limited to the interpretation of results of DNA analysis only. He imparted his knowledge not gained from personally having conducted the test and analysis but by reading a manual on DNA extraction protocol. That being the case, it was understandable why DW4 could not appreciate PW5's explanation of the method of extraction she carried out because he had never personally done the procedure before. (para 131)

(4) The evidence of PW5 clearly showed the deterioration of the samples was not to such an extent as would not permit her to do the DNA profiling. Hence, the finding by PW5 of sperm cells in PW1's anus 56 hours after the sodomy was not unusual. The court had no hesitation in concluding that both PW5 and PW6 were able to obtain perfect DNA profiles which connected the respondent to the offence he was charged with. (para 100)

(5) The contention that PW25 had tampered with the exhibits in P27 was devoid of merit. Tampering and the possibility of tampering the samples by PW25, and also the allegation of contamination, were not proven. PW25's act of cutting open

P27 did not amount to tampering. PW25 had explained that in doing so, he was merely complying with the IGSO and the court, under s. 114(e) of the Evidence Act 1950, could presume that judicial and official acts had been regularly performed. DW2's evidence that the containers bearing the samples were not tamper-proof was merely an opinion he came to after looking at the containers in court. However, under cross-examination, DW2 admitted that he could not say if there had been tampering of the containers. Thus, PW5's testimony that she found no tampering of the containers remained intact. (paras 87, 85, 121, 122 & 123)

(6) In preferring the evidence of DW2 and DW4, the trial judge failed to carry out a critical examination of their evidence and to test it against the whole of the other evidence and the circumstances of the case. The trial judge failed to consider the credibility of their evidence and to give reasons why he preferred their testimony. It was incumbent on the trial judge to have indicated in his judgment that he had undertaken an appraisal and critical evaluation of the evidence, particularly that of DW2 and DW4. Had he undertaken such an exercise, he would, in all certainty, not have mistaken plausibility for veracity. His failure to do so invited appellate intervention. (paras 129, 156 & 157)

(7) The court agreed with the trial judge that the respondent's statement from the dock was a mere denial of the charge. Such denial did not amount to the raising of any doubt whatsoever. A credible defence was one that not only answered the evidence thrown to it by the prosecution but also explained its case. (para 108)

(8) The court was of the opinion that PW1's evidence was unusually convincing. Even if assuming there was no corroboration to support PW1's evidence on the factum of penetration, which was not the case here, it was safe to convict the respondent. There were other ample evidence from which the elements of the charge could be confirmed and proved. (paras 79 & 80)

Bahasa Malaysia *Translation Of Headnotes*

Responden telah dituduh di Mahkamah Tinggi atas kesalahan melakukan liwat terhadap penolong peribadinya ('PW1') apabila PW1 menghantar beberapa dokumen kepada responden di

pangsapurinya. Dua hari selepas kejadian itu, PW1 telah pergi ke Hospital Kuala Lumpur ('HKL') di mana beliau telah membuat satu laporan polis dan diperiksa oleh tiga orang doktor yang telah mengambil swab daripada tempat kemaluannya dan bahagian-bahagian lain dari badannya. Swab-swab tersebut telah dimasukkan ke dalam bekas berasingan, dilekat dan dilabel oleh satu daripada tiga orang doktor tersebut sebelum kesemua bekas-bekas itu dimasukkan ke dalam beg plastik lutsinar ('P27') dan diberi kepada pegawai penyiasat kes, P25, pada keesokan harinya. Sehari selepas menerima P27, PW25 membukanya, mengeluarkan bekas-bekas yang mengandungi swab-swab itu dan memasukkannya ke dalam sampul berasingan sebelum menghantarnya kepada ahli kimia, PW5, di jabatan kimia yang mengkaji dan mendapati air mani dan sel sperma pada keempat-empat swab tersebut. Dalam laporannya, PW5 menyatakan bahawa profil DNA yang dijumpai atas swab-swab itu adalah kepunyaan PW1 dan seorang lagi lelaki yang tidak dikenali. 16 hari kemudian, selepas responden ditahan dalam lokap polis berikutan laporan polis PW1, polis telah menghantar sampul tertutup yang mengandungi item-item barangan yang digunakan oleh responden semasa dalam tahanan kepada PW25 yang telah menghantarnya kepada ahli kimia lain, PW6, di jabatan kimia. Selepas mendapati bahawa item-item itu mengandungi DNA responden, PW6 telah membuat perbezaan hasil ujiannya dengan yang dibuat oleh PW5 sebelum ini dan mendapati bahawa profil DNA lelaki yang tidak dikenali dalam ujian PW5 terhadap swab-swab berpadanan dengan responden. Mendapati bahawa pihak pendakwaan telah membuktikan satu kes *prima facie*, hakim bicara memanggil responden untuk memasukkan pembelaannya. Walaupun responden telah memberi notis awalan bahawa beliau akan membangkitkan pembelaan alibi, pembelaan tersebut diabaikan dan responden memilih untuk memberi kenyataan tidak bersumpah dari kandang dan memanggil tujuh orang saksi untuk menyokong kesnya. Di antaranya adalah dua orang pakar, DW2 dan DW4, yang telah mengkritik kekurangan dan kesimpulan yang dibuat terhadap laporan daripada tiga orang doktor HKL tersebut dan juga analisa yang dibuat oleh PW5 dan PW6. Mereka berpendapat bahawa cara sampel ujian disimpan (iaitu di dalam kabinet besi dan bukannya dalam penyejuk beku), jumlah masa yang berlalu di antara kejadian liwat yang dituduh dan ujian DNA dan jangka masa sel sperma berada di rektum PW1 sebelum ianya dikeluarkan, secara keseluruhannya mempunyai kesan merendahkan nilai sampel sehingga tiada profil DNA boleh dibuat secara muktamad. DW2 juga mencadang bahawa sampel-sampel tersebut mungkin diusik dan DNA responden sengaja diletakkan di sana. Walaupun hakim

A bicara mendapati kenyataan responden dari kandang merupakan penafian semata-mata terhadap tuduhan, berdasarkan keterangan DW2 dan DW4, hakim bicara memutuskan bahawa hasil ujian analisa PW5 adalah bertentangan dengan keterangan DW2 dan DW4, sekaligus menyebabkan keraguan munasabah telah B dibangkitkan oleh pembelaan atas kes pihak pendakwaan. Responden dilepaskan dan dibebaskan pada akhir perbicaraan, menyebabkan rayuan di sini.

Memutuskan (membenarkan rayuan; mengenepikan C keputusan Mahkamah Tinggi; mensabitkan dan menjatuhkan penjara lima tahun terhadap responden)
Oleh Balia Yusof Wahi, Aziah Ali, Mohd Zawawi Salleh HHMR:

D **(1)** Aduan-aduan dan kritik oleh DW2 dan DW4 berkenaan keterangan PW5 dan PW6 atas analisa mereka dan terhadap kesimpulan yang dicapai oleh tiga orang doktor dari HKL itu dalam laporan mereka di eks. P22 tidak mempunyai nilai probatif untuk membangkitkan keraguan munasabah atas kes pendakwaan. Hakim bicara khilaf dalam memutuskan bahawa E keterangan DW2 dan DW4 menunjukkan kemungkinan sampel-sampel itu yang diambil daripada PW1 telah dikompromi dan keputusan analisa DNA oleh PW5 tidak selamat untuk disandarkan.

F **(2)** Hakim bicara gagal untuk mempertimbangkan bahawa keterangan PW5 boleh dipercayai di mana beliau sendiri telah menjalankan beberapa ujian dan analisa sampel berbanding dengan DW2 dan DW4 yang merupakan "arm chair experts" dan tidak mempunyai peluang untuk membuat analisa itu. G Keterangan DW2 dan DW4 merupakan pandangan samata-mata dan kesimpulan mereka diambil terutamanya daripada buku-buku teks dan jurnal, berbanding dengan keterangan PW5 dan PW6 yang berunsur faktual dan berdasarkan analisa mereka sendiri berkenaan sampel-sampel itu. Hakim bicara H mendapati bahawa kedua-dua PW5 dan PW6 mempunyai kelayakan tinggi dalam bidang kepakaran mereka.

(3) Berkenaan kaedah analisa, hakim bicara menerima bahawa PW5 telah menjalankan analisa DNA menggunakan teknik I baru. DW4 pula membuat analisa DNA terakhir pada tahun 2004 dan kepakaran beliau dilihat sebagai terhad kepada tafsiran hasil ujian DNA sahaja. Beliau memberi pengetahuannya yang tidak berpunca daripada ujian dan analisa yang dilakukannya

secara peribadi tetapi dengan membaca manual protokol pengeluaran DNA. Oleh itu, adalah difahami kenapa DW4 tidak boleh menghargai penjelasan PW5 berkenaan kaedah pengeluaran yang telah dibuat oleh PW5 kerana DW4 tidak pernah menjalankan prosedur itu sebelum ini.

(4) Keterangan PW5 jelas menunjukkan bahawa penyusutan nilai sampel-sampel tidaklah sampai ke tahap yang menghalang beliau dari membuat profil DNA. Oleh itu, penemuan PW5 berkenaan sel-sel sperma dalam dubur PW1 56 jam selepas kejadian liwat bukannya sesuatu yang luar biasa. Mahkamah tidak mempunyai sebarang keraguan untuk memutuskan bahawa kedua-dua PW5 dan PW6 dapat memberi profil DNA terbaik bagi mengaitkan responden dengan kesalahan yang beliau telah dipertuduhkan.

(5) Hujah bahawa PW25 telah mengusik ekshibit-ekshibit dalam P27 tidak bermerit. Usikan dan kemungkinan usikan sampel-sampel oleh PW25, dan juga tuduhan pencemaran, tidak dibuktikan. Tindakan PW25 membuka P27 tidak berjumlah kepada usikan. PW25 memberi penjelasan bahawa dalam membuat begitu, beliau mematuhi IGSO, dan mahkamah, di bawah s. 114(e) Akta Keterangan 1950, boleh menganggap bahawa tindakan kehakiman dan rasmi telahpun dijalankan dengan teraturnya. Keterangan DW2 bahawa bekas-bekas yang mempunyai sampel tidak selamat daripada usikan hanya merupakan pandangannya apabila beliau melihat bekas-bekas itu di mahkamah. Walau bagaimanapun, semasa pemeriksaan balas, DW2 mengaku bahawa beliau tidak boleh berkata sama ada terdapat usikan pada bekas-bekas itu. Berdasarkan itu, keterangan PW5 yang beliau mendapati bahawa tiada usikan pada bekas-bekas itu masih utuh.

(6) Dalam memilih keterangan DW2 dan DW4, hakim bicara gagal menjalankan pemeriksaan kritikal atas keterangan mereka dan mengujinya terhadap keseluruhan keterangan lain dan keadaan kes. Hakim bicara gagal mempertimbangkan kredibiliti keterangan mereka dan memberi alasan kenapa beliau memilih keterangan mereka. Hakim bicara sepatutnya menyatakan dalam penghakimannya bahawa beliau telah membuat penilaian kritikal terhadap keterangan, terutamanya keterangan DW2 dan DW4. Jika beliau telah membuat sedemikian, beliau

A mungkin, dalam semua kemungkinan, tidak tersalah anggap kemunasabahan bagi kebenaran. Kegagalan beliau telah mewajarkan campur tangan rayuan.

(7) Mahkamah bersetuju dengan hakim bicara bahawa kenyataan
B responden dari kandang merupakan penafian semata-mata. Penafian sedemikian tidak membangkitkan sebarang keraguan. Pembelaan kredibel bukan sahaja menjawab keterangan yang dikemukakan kepadanya oleh pihak pendakwaan tetapi turut menjelaskan kesnya.

C
(8) Mahkamah berpendapat bahawa keterangan PW1 boleh diterima. Walaupun diandaikan bahawa tiada sokongan kepada keterangan PW1 atas fakta kemasukan kemaluan, yang bukannya kes di sini, ia adalah selamat untuk mensabitkan responden. Terdapat keterangan lain di mana unsur-unsur
D tuduhan boleh disahkan dan dibuktikan.

Case(s) referred to:

Aziz Muhamad Din v. PP [1997] 1 BLJ 523; [1997] 1 CLJ Supp 523 HC ***(refd)***

E *Chiu Nang Hong v. PP [1964] 1 LNS 24 PC* ***(refd)***

Clarke v. Edinburgh and District Tramways Co Ltd [1919] SC (HL) 35 ***(refd)***

Dato' Mokhtar Hashim & Anor v. PP [1983] 2 CLJ 10; [1983] CLJ Rep 101 FC ***(refd)***

Dato' Seri Anwar Ibrahim v. PP & Another Appeal [2004] 3 CLJ 737 FC
F ***(refd)***

Din v. PP [1964] 1 LNS 33 FC ***(refd)***

Dr Rajesh Talwar & Anor v. Central Bureau of Investigation 2013 (82) ACC 303 ***(refd)***

Dr Shanmuganathan v. Periasamy Sithambaram Pillai [1997] 2 CLJ 153 FC
G ***(refd)***

Goh Ah Yew v. PP [1948] 1 LNS 13 HC ***(refd)***

Hanafi Mat Hassan v. PP [2006] 3 CLJ 269 CA ***(refd)***

Herchun Singh & Ors v. PP [1969] 1 LNS 52 FC ***(refd)***

Illian & Anor v. PP [1988] 1 LNS 139 ***(refd)***

K Gopal Reddy v. State of Andhra Pradesh 1979 AIR 387 ***(refd)***

H *Kandasami Kaliappa Gounder v. Mohd Mustafa Seeni Mohd [1983] 2 CLJ 55; [1983] CLJ 7 (Rep) PC* ***(refd)***

Kuruma v. R [1955] AC 197 ***(refd)***

Lai Kim Hon & Ors v. PP [1980] 1 LNS 197 FC ***(refd)***

Lee Ing Chin & Ors v. Gan Yook Chin & Anor [2003] 2 CLJ 19 CA ***(refd)***

I *Liew Kaling & Ors v. PP [1960] 1 LNS 60* ***(refd)***

Miller v. Minister of Pensions [1947] 2 All ER 372 ***(refd)***

Ms Robert Charles Bropho v. The State of Western Australia [2007] WAOC 77 ***(refd)***

Muniandy & Ors v. PP [1966] 1 LNS 110 FC ***(refd)***
Munusamy Vengadasalam v. PP [1987] 1 CLJ 250; [1987] CLJ (Rep) 221 SC ***(refd)***
Murugiah v. PP [1940] 1 LNS 59 HC ***(refd)***
Norman John Rose 69 A Crim R 1 ***(refd)***
Ong Chan Tow v. Regina [1963] 1 LNS 88 HC ***(refd)***
Piara Singh & Ors v. State of Punjab [1977] AIR SC 2274 ***(refd)***
Powell and Wife v. Streathem Manor Nursing Home [1935] AC 243 ***(refd)***
PP lwn. Mohamad Malek Ridhzuan Che Hassan [2013] 8 CLJ 359 CA ***(refd)***
PP v Mardai [1949] 1 LNS 65 HC ***(refd)***
PP v. Karim Othman [1994] 2 CLJ 826 HC ***(refd)***
PP v. Lam San [1991] 3 CLJ 2410; [1991] 1 CLJ (Rep) 391 SC ***(refd)***
PP v. Loo Seng Yip [2004] 8 CLJ 496 HC ***(refd)***
PP v. Mohammed Liton Mohammed Sayeed Mallik [2008] 1 SLR 601 ***(foll)***
Punjab Singh v. State of Haryana [1984] AIR SC 1233 ***(refd)***
R v. Butler [2001] QCA 385 ***(refd)***
R v. Dunn & O'Sullivan [1922] 17 Cri App R 12 ***(refd)***
State of Kerala v. Kurissum Mottil Antony [2007] AIR SCW 1509 ***(refd)***
State of Maharashtra v. Chandraprakash Kewalchand Jain [1990] AIR SC 658 ***(refd)***
State of Punjab v. Rameshwar Dass [1975] Cri LJ 1630 ***(refd)***
State of Rajasthan v. Hanuman AIR [2001] SC 282 ***(refd)***
States & Others v. Jyotish Prasad & Others LNIND 2009 DEL 799 ***(refd)***
Tindok Besar Estate Sdn Bhd v. Tinjar Co [1979] 1 LNS 119 FC ***(refd)***

Legislation referred to:
Criminal Procedure Code, ss. 307(iii), 402A
Emergency (Essential Powers) Ordinance No. 22 of 1970, s. 2(1)
Evidence Act 1950, s. 114(e), (g)
Penal Code, ss. 195, 377B

Other source(s) referred to:
Forensic Science In Criminal Investigation & Trials, 4th edn, p 1118
Jane Moira Taupin, *Introduction to Forensic DNA Evidence For Criminal Justice Professionals*, CRC Press, p 18

For the prosecution - Muhammad Shafee Abdullah (Mohamad Hanafiah Zakaria & Noorin Badaruddin with him); DPPs
For the respondent - Karpal Singh (Ram Karpal Singh, Sangeet Kaur Deo, Zaleha Al-Hayat & Jeremy Vinesh Anthony with him); M/s Karpal Singh & Co

[Appeal from High Court, Kuala Lumpur; Criminal Trial No: 45-9-2009]

Reported by Amutha Suppayah

JUDGMENT

Balia Yusof Wahi, Aziah Ali, Mohd Zawawi Salleh JJCA:

[1] Dato' Seri Anwar bin Ibrahim ("the respondent") was charged before the High Court at Kuala Lumpur with an offence punishable under s. 377B of the Penal Code ("the PC"). At the end of the defence case, the respondent was acquitted and discharged.

[2] Aggrieved by the said order of acquittal and discharge, the Public Prosecutor ("PP") has now appealed to this court urging the reversal of the said impugned order.

[3] We have heard Tan Sri Muhammad Shafee bin Abdullah (assisted by Dato' Mohamad Hanafiah bin Zakaria and Noorin binti Badaruddin) appearing for the PP and Encik Karpal Singh (assisted by Ram Karpal Singh, Sangeet Kaur Deo, Zaleha Al-Hayat and Jeremy Vinesh Anthony) appearing for the respondent. We have also perused the written submissions and the appeal record carefully. For the reasons that follow we find there is merit in this appeal and accordingly we allowed the appeal by the PP. We set aside the decision of the High Court. We found the respondent guilty as charged and we convicted him. After having considered the mitigation plea by both parties, we imposed the sentence of five years' imprisonment. However we allowed the application by learned counsel Mr Karpal Singh for a stay of execution of the sentence. We set bail at RM10,000 with one surety.

[4] We now give the reasons for our decision.

Antecedents

[5] This appeal has had a chequered history. In order to put this appeal in perspective, we think we ought to recall some of the antecedent events in some detail:

1.	09.01.2012	Decision of the Kuala Lumpur High Court
2.	20.01.2012	Notice of appeal filed by PP
3.	09.07.2012	Petition of Appeal filed
4.	13.07.2012	First case management. Counsel for respondent informed Deputy Registrar that incomplete record of appeal had been received.

5.	07.09.2012	Second case management before Deputy Registrar. DPP informed court they are in the midst of comparing the notes contained in the compact disc with the DPP's own notes. DPP requests for more time.
6.	23.11.2012	Third case management before Deputy Registrar. DPP informs court they need more time to go through the notes.
7.	15.02.2013	Fourth case management before Deputy Registrar. Deputy Registrar instructed parties to transcribe and finalise notes by March 2013, and a hearing date will be fixed in July 2013.
8.	22.02.2013	Fifth case management before Deputy Registrar. Hearings dates fixed for 22-23.7.2013. Parties directed to file written submissions two weeks before hearing.
9.	26.04.2013	Sixth case management before Deputy Registrar. Parties informed court that they had requested for recordings from the Kuala Lumpur High Court *vide* letter dated 8.3.2013.
10.	31.05.2013	Seventh case management before Deputy Registrar. Parties informed court that notes of proceedings dated 9.2.2010, 22.11.2010, 23.11.2010 and 24.11.2010 were incomplete. Counsel for respondent informed court they will request for the recordings from Kuala Lumpur High Court.
11.	07.06.2013	Eighth case management before Deputy Registrar. Counsel for respondent informed court that they did not receive recording for 9.2.2010. They were informed by court that there was no recording for 9.2.2010.
12.	19.06.2013	Ninth case management before Deputy Registrar. Parties informed court that PW1 did not testify on 9.2.2010 because respondent's counsel had filed an application to recuse the trial judge. So hearing was adjourned to 10.2.2010. Parties informed court that there were 11 interlocutory appeals filed at Court of Appeal during the course of the trial and requested that judges who had presided in those interlocutory appeals be excluded from hearing the appeal proper.

13.	22.07.2013	First hearing. Coram: Ramly Hj Ali, JCA; Tengku Maimun bt Tuan Mat, JCA and Mohd Zawawi Salleh, JCA. Hearing was adjourned because lead counsel for respondent Mr Karpal Singh was admitted to hospital for back pain.
14.	01.08.2013	Tenth case management before Deputy Registrar. Counsel for respondent informed the court that they will file an application to disqualify Tan Sri Mohammad Shafee from leading the prosecution team in the appeal. Hearing of appeal and motion, if any, fixed for 17-18.9.2013.
15.	23.08.2013	Notice of motion enclosure 27(a) application to disqualify Tan Sri Shafee filed.
16.	17.09.2013	Hearing of appeal and enclosure 27(a). Coram: Ramly Hj Ali, JCA; Tengku Maimun bt Tuan Mat, JCA and Mohd Zawawi Salleh, JCA. Lead counsel Karpal Singh applied for Tengku Maimun to recuse herself because Her Ladyship had presided in the defamation suit brought by the respondent against Tun Mahathir. Application was granted.
17.	18.09.2013	Hearing of enclosure 27(a). Coram: Ramly Hj Ali, JCA; Rohana Yusof, JCA and Mohd Zawawi Salleh, JCA. Enclosure 27(a) was dismissed.
18.	20.09.2013	Notice of appeal against decision on enclosure 27(a) filed by respondent.
19.	02.10.2013	Case management before President of Court of Appeal. Mr Karpal Singh informed court that appeal has been filed to Federal Court in respect of dismissal of enclosure 27(a). Date of hearing of appeal fixed for 11-12.12.2013.
20.	21.11.2013	Federal Court dismissed appeal against decision on enclosure 27(a).
21.	06.12.2013	Notice of motion (enclosure 48(a)) to disqualify Tan Sri Mohammad Shafee filed.
22.	11.12.2013	Hearing of appeal and enclosure 48(a). Coram: Aziah Ali, JCA; Rohana Yusof, JCA and Mohd Zawawi Salleh, JCA. Hearing adjourned because lead counsel for respondent was admitted to hospital and because the respondent requested for time to reply to Tan Sri Shafee's affidavit dated 10.12.2013.

23.	19.12.2013	Hearing of enclosure 48(a). Coram: Aziah Ali, JCA; Rohana Yusof, JCA and Mohd Zawawi Salleh, JCA. Decision adjourned to 20.12.2013.
24.	20.12.2013	Notice of motion enclosure 48(a) was dismissed. Coram: Aziah Ali, JCA; Rohana Yusof, JCA and Mohd Zawawi Salleh, JCA.
25.	30.01.2014	Notice of hearing issued to parties to inform that date of hearing of appeal was fixed for 12-13.4.2014.
26.	04.02.2014	Notice of motion (enclosure 62(a)) filed by respondent to recall the investigating officer to testify in Court of Appeal.
27.	11.02.2014	Federal Court dismissed respondent's appeal in respect of enclosure 48(a).
28.	12.02.2014	Hearing of appeal and enclosure 62(a). Coram: Aziah Ali, JCA; Rohana Yusof, JCA and Mohd Zawawi Salleh, JCA. Enclosure 62(a) was dismissed. Respondent's application for stay of proceedings granted pending respondent's appeal to Federal Court.
29.	25.02.2014	Notice of motion (enclosure 73(a)) to disqualify Tan Sri Mohammad Shafee filed.
30.	28.02.2014	Case management before Aziah Ali, JCA. Hearing of enclosure 73(a) fixed for 3.3.2014 and hearing of the appeal was fixed for 6-7.3.2014. No objection taken by both parties.
31.	03.03.2014	Hearing of appeal and enclosure 73(a). Coram: Balia Yusof bin Hj Wahi, JCA; Aziah Ali, JCA and Mohd Zawawi Salleh, JCA. Enclosure 73(a) was dismissed. Respondent's application for stay of proceedings pending respondent's appeal to Federal Court was refused.
32.	04.03.2014	Federal Court allowed the prosecution's preliminary objection to strike out the appeal in respect of enclosure 62(a). Federal Court refused application for interim stay.
33.	06.03.2014	Hearing of appeal commenced. Coram: Balia Yusof bin Hj Wahi, JCA; Aziah Ali, JCA and Mohd Zawawi Salleh, JCA. Adjourned for continued hearing on 7.3.2014.

34.	07.03.2014	Continued hearing of appeal. Coram: Balia Yusof bin Hj Wahi, JCA; Aziah Ali, JCA and Mohd Zawawi Salleh, JCA. Appeal by prosecution is allowed. The respondent was found guilty and convicted as charged. Decision of High Court to acquit and discharge the respondent was set aside. The respondent was sentenced to five years' imprisonment. Application for stay of execution of sentence was allowed. Bail was granted at RM10,000.00 with one surety.

[6] Based on the above facts, it would be stretching it too far to say that this appeal has been disposed of in haste. It should be noted that most of the applications to adjourn were at the instance of the respondent who had filed one application after another. It can be seen that the first hearing of the appeal was fixed on 22 July 2013 by which time both parties ought to have filed their respective written submissions. However, only the appellant filed its written submissions dated 19 July 2013 together with the bundle of authorities. The court received the respondent's first written submissions only on 12 February 2014 and another written submissions on the first hearing day ie, 6 March 2014.

[7] It is in the public interest that criminal appeals be dealt with by the courts as soon as possible. Dilatory practices bring the administration of justice into disrepute. As is often pointed out, "delay is a known defence tactic". It is not proper for a counsel to routinely fail to expedite hearing an appeal solely for the convenience of his client. Nor will a failure to expedite be reasonable, if done for the purpose of frustrating an opposing party to obtain rightful redress. Counsel should not intentionally use procedural devices to delay proceedings without any legal basis.

Facts Of The Case

[8] The facts of the case have been fully set out by the learned trial judge in his grounds of judgment. We do not wish to regurgitate except for the relevant facts that are germane to the disposal of this appeal.

The Prosecution's Version

[9] Mohd Saiful Bukhari bin Azlan (PW1) started to work as the respondent's personal assistant since April 2008. His duties

were to arrange for meetings, to file confidential documents, to oversee the respondent's personal handphone, and to assist the chief of staff, Ibrahim Yaacob (PW24), in preparing work schedule.

[10] On 26 June 2008, PW1 went to Unit 11-5-2, Desa Damansara Condominium, No.99 Jalan Setiakasih, Bukit Damansara. He went there on the respondent's instruction. PW1 took along some documents received from PW24 to be delivered to the respondent.

[11] PW1 left the office at about 1.45pm, and drove to Desa Damansara Condominium in a Fiat van bearing registration number WPK 5925, registered in the name of Mohamad Zaki bin Mohamad (father of PW1's ex-fiancée).

[12] PW1 arrived at the condominium at approximately 2.45pm. Upon arriving at the unit, he entered the unit as the door was not locked. The respondent was already seated at the dining table. PW1 sat at the table facing the respondent and placed the documents on the table, for the respondent's perusal.

[13] The respondent and PW1 discussed work schedule and not long after that the respondent asked PW1 to have carnal intercourse with him. PW1 refused initially and the respondent asked him why. PW1 responded in the negative, but was instructed by the respondent (in an angry tone) to go into the master bedroom.

[14] PW1 complied with the respondent's instruction. In the room, the respondent had closed the curtain and switched off the light. He then directed PW1 to clean himself in the bathroom. PW1 did what was told, and exited the bathroom covered only with a towel.

[15] The respondent was seen standing at the lower right end corner of the bed, clad only in a white towel. PW1 went to the respondent when he was told to do so, and the respondent hugged PW1.

[16] PW1 narrated the intercourse by describing how his anus was penetrated by the respondent's penis with the aid of lubricant known as 'KY Jelly'. After the sexual intercourse, PW1 cleaned himself and had a drink with the respondent. PW1 left the unit leaving behind the respondent.

[17] On 27 June 2008, PW1 sent an email to the respondent conveying his desire to resign.

[18] On 28 June 2008 at 1pm, PW1 accompanied by his uncle Encik Tuah bin Mohd Ali, went to Tawakkal Hospital at Jalan Pahang but failed to see any doctor because it was a half day. PW1 then proceeded to Pusrawi Hospital at Jalan Tun Razak where he met with Dr. Mohd Osman bin Abdul Hamid (DW1). PW1 informed DW1 that he had stomach ache and pain in his anus. PW1 was examined by DW1 and while DW1 was inserting something into PW1's anus, PW1 told DW1 that he was sodomised and needed an examination. Upon hearing this, DW1 immediately stopped examining PW1 and told PW1 that Pusrawi Hospital did not have the facility for forensic analysis. PW1 was also informed by DW1 that medical report from private hospital could not be used as evidence in court. PW1 was then directed by DW1 to go to a government hospital and DW1 suggested Hospital Kuala Lumpur.

[19] At the Hospital Kuala Lumpur, PW1 lodged a police report and was also examined by three doctors, namely, Dr Khairul Nizam bin Hassan (PW2), Dr Siew Sheue Feng (PW3) and Dr Mohd Razali Ibrahim (PW4). Also present was Dr Fazuin binti Rahimi (PW23), who filled up the proforma form.

[20] PW2 and PW4 conducted an examination on PW1. PW2 took swabs from the perianal region, low rectal and high rectal swab from PW1 while PW4 took swabs from the oral cavity at the left peritonsilar recess, below the tongue, from the left nipple and areola. PW4 also took penile swab from the meatus and coronal sulcus of PW1's penis.

[21] The exhibits collected from PW1 at the hospital were placed into individual containers, labelled and sealed by PW3. The exhibits were then placed inside a transparent plastic bag (exh. P27) which was then sealed and handed over to PW25, the investigating officer ("IO") at 12.35am on 29 June 2008. PW25 then placed the exh. P27 in a steel cabinet in his air-conditioned office.

[22] On 30 June 2008, at about 9am, PW25 cut the bottom of exh. P27 and put each container containing the swabs into individual envelopes which he marked as 'B', 'B1' to 'B10'. On the same day at about 7.55pm, PW25 handed over the envelopes together with a handing over form 'Pol.31' (exh. P24) to the

chemist Dr Seah (PW5) who acknowledged receipt through exh. P30. In her testimony, PW5 confirmed that she found no evidence of any tampering to the seals on the various individual containers which contained the swabs. According to her, had she found any evidence of tampering she would have stated it in her report.

[23] In the chemist report prepared by PW5 (exh. P25), she has recorded the results of her analysis of the exhibits in the containers. From the examination, PW5 was able to detect semen on swabs B5, B7, B8 and B9. Using the sperm isolation test, she found sperm cells in those specimens and from a microscopic examination, PW5 found sperm heads. The chemist report prepared by PW5 shows the following:

(a) the DNA profile derived from swab B5 consisted of a mixture of male DNA types concordant with being contributed by PW1, 'Male Y' and another male contributor;

(b) the DNA profiles derived from swab 'B7' labelled with the name of PW1 consisted of male DNA types from two individuals, one having a DNA profile matching the specimen from PW1 and one matching the DNA profile of 'Male Y';

(c) the DNA profiles derived from swab 'B8' labelled with the name of PW1 indicated one dominant male contributor concordant with the DNA profile of PW1 and 'Male Y' as a minor contributor; and

(d) the DNA profiles derived from swab 'B9' labelled with the name of PW1 consisted of male DNA types from two individuals concordant with being contributed by PW1 and 'Male Y'.

[24] On 16 July 2008, DSP Yahya (PW17), L/Kpl Nik Rosmadi (PW18) and L/Kpl Mohd Azri (PW19) confirmed that the respondent was brought and detained in the lock-up at Kuala Lumpur Police Contingent Headquarters (IPK Kuala Lumpur). According to PW17, the respondent brought with him a bottle of mineral water and two towels. At the lock-up, PW18 gave to the respondent a package containing a white 'Good Morning' towel (exh. P59A), a tooth brush (exh. P58A), a tube of tooth paste and a bar of soap.

[25] On 17 July 2008 after the respondent was taken out of the lock-up, PW17 saw a 'Good Morning' towel and a tooth brush on the lock-up floor and a mineral water bottle on the toilet wall. PW17 was instructed to lock the lock-up cell. Supt Amidon (PW15) went to the lock-up which had been occupied solely by the respondent. He was assisted by PW16. On the floor of the lock-up, PW15 saw the following items:

(i) a strand of hair (exh. P57A);

(ii) a white tooth brush (exh. P58A);

(iii) a white 'Good Morning' towel (exh. P59A), and

(iv) a mineral water bottle (exh. P61A).

[26] PW15 instructed PW14 to take photographs of those items. He also instructed PW16 to prepare four envelopes (exhs. P57, P58, P59 and P61). Each of the above items was placed inside individual envelopes. The envelopes were marked with numbers 4, 5, 6 and 7. PW15 signed the back of each envelope and sealed them. On the same day, PW15 handed over the items to PW25, the IO at the IPK Kuala Lumpur. Both PW15 and PW25 signed a handing over form (exh. P80).

[27] PW25 took the items back to his office and at about 3.35pm and kept them in the steel cabinet in his office. PW25 marked each envelope as 'D', 'D1', 'D2' and 'D3' (exhs. P57, P58, P59 and P61) and sealed the envelopes with 'PDRM' seal. At about 6.50pm, PW25 took the items and handed them over to Siti Aidora (PW6) at the Chemistry Department.

[28] PW6 successfully developed DNA profiles from the tooth brush, the 'Good Morning' towel and the mineral water bottle, but not from the hair. These DNA profiles matched each other, indicating that the DNA identified originated from the same source. PW6 then compared the DNA profiles she obtained with that obtained by Dr Seah (PW5). PW6 found the DNA profiles developed from the tooth brush, the 'Good Morning' towel and the mineral water bottle matched the DNA profile of 'Male Y'. Thus, this indicates that the DNA identified originated from a common source. PW6 prepared a report (exh. P62).

[29] It is on the basis of the aforesaid oral and documentary evidence that the learned trial judge decided that the prosecution had succeeded in establishing a *prima facie* case against the respondent. In so doing, the learned trial judge had regard to the following:

(a) that the credibility of PW1 was intact;

(b) that there was corroboration of the testimony of PW1;

(c) that the integrity and chain of evidence in relation to the exhibits was neither broken nor compromised.

[30] Accordingly, the learned judge called upon the respondent to enter his defence.

The Defence Version

[31] The respondent had earlier given a notice of alibi pursuant s. 402A of the Criminal Procedure Code and listed 14 witnesses in support of his alibi. However, when he was called upon to enter his defence, the respondent elected to give a statement from the dock and called another seven witnesses in support of his defence case. The defence of alibi was abandoned.

[32] For the purpose of this appeal, we find that only the evidence of Professor David Lawrence Wells (DW2), Dr Brian Leslie McDonald (DW4) and Dr Thomas Hoogland (DW7) are material for consideration of the defence case.

[33] The respondent's statement from the dock may be summarised as follows:

He criticised the evidence of PW1 in that:

(a) PW1 had all the opportunity to flee;

(b) PW1 did not seek immediate medical attention;

(c) the medical evidence did not support PW1's complaint;

(d) PW1 did not lodge a police report immediately after the incident;

(e) PW1's conduct did not support his claim of being sodomised because he had a drink and friendly conversation with the respondent immediately after the incident and attended PKR's functions and meeting of Anwar Ibrahim's club the next day;

(f) PW1 could not have submitted to the respondent as he is younger and physically bigger than the respondent;

(g) PW1 has connections with the Prime Minister and the Inspector General of Police;

(h) the respondent is old and weak with a history of back injury and had undergone a major surgery; and

(i) the respondent does not hold any position of power.

[34] The respondent further attacked the evidence of the chemists in that:

(a) the DNA that was obtained by the chemists did not come from the specimens taken from PW1's rectum;

(b) the specimens collected from the perianal and rectum of PW1 had degraded;

(c) the specimens had been tampered with; and

(d) the respondent's DNA was planted.

[35] The respondent had also complained about the trial process in that:

(a) the prosecution had failed to disclose materials critical to his defence and the failure of the court to direct the prosecution to do so;

(b) the court failed to take contempt proceedings against the media and persons who made prejudicial statements out of the court to influence the course of the trial;

(c) failure on the part of the court to act on the allegation that PW1 had an affair with a member of the prosecution team;

(d) the finding of the court that PW1 was a truthful witness, thus, prejudging the case;

(e) the adverse comments made by Justice Malek Ishak against the respondent when delivering the judgment of the Court of Appeal had prejudiced him and would deprive him of a fair trial;

(f) the court giving a lifeline to witnesses by stating in open court that they could refuse to be interviewed, thus, compelling the defence to resort to applying for subpoena for their presence;

(g) the trial judge failed to order witnesses critical to his defence to attend court to testify on his behalf;

(h) the trial judge's refusal to recuse himself after prejudging the case against the accused;

(i) the accused was arrested unlawfully;

(j) illegal means of obtaining DNA evidence;

(k) integrity of the samples was compromised;

(l) there is a possibility that the samples had been tampered with;

(m) credibility and competency of the prosecution's expert were in doubt; and

(n) the court had created a situation under which the respondent could not possibly give evidence under oath.

[36] The respondent also advanced the theory of conspiracy by the Prime Minister, Dato' Seri Mohd Najib bin Abdul Razak, for the purpose of ending his political career by putting him behind bars.

[37] Dr Osman bin Abdul Hamid (DW1) was offered to the defence by the prosecution and was the first witness called by the defence to support the respondent's case. According to DW1, on 28 June 2008, PW1 had turned up at Hospital Pusrawi for treatment complaining of pain in the anus when passing motion. DW1 examined PW1 using a protoscope for suspected piles but found no injury. As PW1 was putting on his trousers and DW1 was washing his hands, PW1 told DW1 that he was sodomised by a VIP and was scared to go to the police. According to DW1, had he been informed earlier, he would not have carried out the examination of PW1. DW1 alleged that PW1 told him that he had been assaulted by insertion of plastic into his anus.

[38] Learned counsel for the respondent in his submissions urged this court to invoke s. 114(g) of the Evidence Act 1950 because the prosecution had failed to call DW1 as a witness for the prosecution. It was submitted that had DW1 been called, he would have given evidence against the prosecution on the manner under which the injury was caused to PW1's anus. Learned counsel further submitted that DW1 was an important witness because he was the first doctor that PW1 met up with and PW1

had allegedly told DW1 that he was assaulted by the introduction of plastic into his anus, although PW1 had denied this. According to learned counsel, the evidence of DW1 was necessary to unravel the narrative of the prosecution case and it was submitted that without calling DW1 as a prosecution witness, it leaves a serious gap in the prosecution's case.

[39] We have perused the evidence of DW1 and the record of his examination dated 28 June 2008 (exh. ID D16). DW1 agreed that the notation in the report regarding assault by introducing plastic into the anus was added later. We have also perused the medical report dated 30 June 2008 (ID 16A) and find no mention was made about any assault with a plastic. But what can be determined from the testimony of DW1 is that PW1 made a complaint to him about being sodomised by a VIP.

[40] In the case of *Dr Rajesh Talwar & Anor v. Central Bureau of Investigation* 2013 (82) Acc 303, the Indian court had this to say:

> ... there is no gainsaying of the fact that production of prosecution witnesses is the sole and absolute discretion of the public prosecution. It is for him to state before the court at the very outset of the trial as to by what evidence he is going to establish the charge against the accused. Who is to be examined and the sequence and manner of examination of its witnesses are all matters which lies with such an exercise of power by him. Prosecution should make all endeavour to unfold its case in the chronological order in which the incident had occurred and should examine all those witnesses justly and fairly who are essential to unfold its story. Prosecutor is expected to act in a manner which serves best course in achieving justice without being guided by the ultimate result ...

[41] The discretion to call a particular witness by the public prosecution will invariably depend on a number of considerations, including whether the evidence of the witness is essential to the unfolding of the prosecution's case or the evidence of the witness will be credible and truthful.

[42] Based on this, we fail to see how the evidence of DW1, had he been called by the prosecution, would be adverse to the prosecution case. We find no merit in the submissions of learned counsel that s. 114(g) ought to be invoked against the prosecution.

[43] The defence also called expert witnesses to challenge the integrity of the DNA samples. Professor David Lawrence Wells (DW2) testified that beyond 36 hours after a sexual assault, one could hardly succeed in collecting any specimen of value from which DNA could be extracted. DW2 also testified that in view of the manner the specimens were packed, sealed and stored, it is not possible to extract DNA from the sperm cells because samples of this nature would degrade. Therefore, it is impossible to have positive findings on the samples taken from PW1 after 56 hours.

[44] DW2 suggested that the samples could be contaminated and the respondent's DNA was planted. DW2 also criticised that the medical report (exh. P22) was lacking in particulars, such as the omission to state the time when the samples were collected, and the errors in dates on certain exhibits.

[45] The evidence of Dr Brian Leslie McDonald (DW4) was regarding the accreditation of the laboratory of the Chemistry Department, and that the two chemists Dr Seah (PW5) and Puan Aidora (PW6) were not competent to extract DNA and interpret the DNA profiles. DW4 also attacked the differential extraction process carried out by PW5.

[46] We will deal with the evidence of DW2 and DW4 in greater detail in the later part of this judgment.

[47] Dr Thomas Hoogland (DW7), claimed that the respondent could not possibly perform the act as described by PW1 as the respondent was labouring under intense back pain resulting from degeneration in the facet joint.

Prima facie Case

[48] It was contended by learned counsel for the respondent that the learned judge had in the first place erred in calling for the defence for the following reasons:

(a) the learned trial judge failed to appreciate that the exhibits, particularly the seminal swabs, had been tampered with;

(b) the learned trial judge failed to appreciate that the complainant PW1 was unworthy of credit; and

(c) the learned trial judge failed to appreciate that the prosecution had failed to prove penetration on a maximum evaluation of the evidence before him.

[49] Accordingly, it is our considered view that it is incumbent upon this court to first consider whether the learned trial judge had correctly in law and on the facts found that the prosecution has established a *prima facie* case and to call for the defence. If he had not, it will not be necessary for us to consider the defence and the respondent is entitled to an acquittal (see *Dato' Seri Anwar Ibrahim v. PP & Another Appeal* [2004] 3 CLJ 737; [2004] 3 MLJ 405).

Credibility Of PW1

[50] Learned counsel for the respondent mounted an aggressive attack on the credibility of PW1 on the ground that he is not a good Muslim, came from a broken family and his sister had eloped with a man. PW1 was labelled a traitor when he admitted being a Barisan Nasional supporter but had voted for Parti Keadilan Rakyat ("PKR") in the last general election. Learned counsel had also criticised the conduct of PW1 after the incident in that:

(a) he had not attempted to escape although he had ample opportunity to do so, but on the contrary had followed every instruction given by the respondent;

(b) he was eating and drinking with the respondent immediately after the incident;

(c) he had not attempted to seek help from the occupier of the condominium;

(d) he had not complained to the security guard;

(e) he did not lodge a police report; and

(f) he had attended a PKR function the next day.

[51] Learned counsel had also submitted that PW1 had lied in his police report (exh. P3) when in his police report he stated that the incident had occurred without his consent. Therefore the entire evidence of PW1 could not be believed and ought to be rejected. In fact, learned counsel had suggested that PW1 ought to be charged under s. 195 of the Penal Code.

[52] We have scrutinised the evidence of PW1 carefully and we are in full agreement with the learned judge when His Lordship found that it was not difficult to understand why PW1 had acted in the way that he did although he insisted that he did not

consent to the respondent's act. PW1 was a young man of 20 years old, employed by the respondent as his personal assistant who had to deal directly and personally with the respondent. PW1 idolised the respondent since young. The respondent was generous to PW1 and had presented PW1 with a suit less than two months after he started employment with the respondent. PW1 was also given preferential treatment when he was allocated a room in his office over his more senior colleagues.

[53] The learned judge found that PW1 had previously complained about similar acts to various people and in fact his uncle, Ezam and Mumtaz, had discouraged him from lodging a police report. Some of these persons were even sceptical of PW1's complaint.

[54] We further agree with the finding of the learned trial judge on the credibility of PW1 and there was nothing improbable about his evidence. His Lordship found that the evidence of PW1 was reliable.

[55] It is trite law that credibility of witnesses is the domain of the trial judge. We are satisfied that the learned trial judge had sufficiently considered and appreciated the evidence of PW1 and His Lordship is entitled to make a finding on his credibility.

[56] An appellate court should be slow in interfering with findings made by the trial judge on the issue of credibility of witnesses. In *Muniandy & Ors v. PP* [1966] 1 LNS 110, the Federal Court had this to say:

> We appreciate that this court should not lightly differ from the views of the trial judge since he had the advantage of seeing and hearing the witnesses whose demeanour he was able to study in order to form his opinion as to their credibility. However, in certain circumstances, it would be right and proper to do so. As was said by Lord Green MR in *Yuill v. Yuill*:
>
> > We were reminded of certain well-known observations in the House of Lords dealing with the position of an appellate court when the judgment of the trial judge has been based in whole or in part on his opinion of the demeanour of witnesses. It can, of course, only be on the rarest occasions, and in circumstances where the appellate court is convinced by the plainest considerations, that it would be justified in finding that the trial judge had formed a wrong opinion. But when the court is so convinced it is, in my

> opinion, entitled and indeed bound to give effect to its conviction. It has never been laid down by the House of Lords that an appellate court has no power to take this course. Puisne judges would be the last persons to lay claim to infallibility, even in assessing the demeanour of a witness. The most experienced judge may, *albeit* rarely, be deceived by a clever liar, or led to form an unfavourable opinion of an honest witness and may express his view that his demeanour was excellent or bad as the case may be. Most experienced counsel can, I have no doubt, recall at least one case where this has happened to their knowledge. I may further point out that an impression as to the demeanour of a witness ought not to be adopted by a trial judge without testing it against the whole of the evidence of the witness in question. If it can be demonstrated to conviction that a witness whose demeanour has been praised by the trial judge has on some collateral matter deliberately given an untrue answer, the favourable view formed by the judge as to his demeanour must necessarily lose its value.

(see also *Herchun Singh & Ors v. PP* [1969] 1 LNS 52; [1969] 2 MLJ 209, FC); *Clarke v. Edinburgh and District Tramways Co Ltd* [1919] SC (HL) 35; *Powell and Wife v. Streathem Manor Nursing Home* [1935] AC 243; *Lai Kim Hon & Ors v. PP* [1980] 1 LNS 197; [1981] 1 MLJ 84; *Kandasami Kaliappa Gounder v. Mohd Mustafa Seeni Mohd* [1983] 2 CLJ 55; [1983] CLJ 7 (Rep); [1983] 2 MLJ 85.

[57] We find no ground to disturb the findings of the trial judge on the issue of credibility of PW1. Accordingly, the challenge by the respondent on the credibility of PW1 cannot prevail.

[58] As a matter of interest, the Federal Court in *Dato' Seri Anwar Ibrahim v. PP & Another Appeal (supra)*, in allowing the appeal by the appellant against his conviction, found that the evidence of the complainant, Azizan bin Abu Bakar, was impugned for various reasons, *inter alia*, Azizan's evidence was impeached with regard to the date of the offence and his confession alleging that the appellant had committed the offence was rejected by the Federal Court. The nature of the evidence of Azizan in that case is a far cry from the evidence of PW1 in the instant appeal.

Corroboration

[59] As regards the issue of corroboration of the evidence of PW1 on the factum of penetration, the learned trial judge found

that the evidence of PW1 that he was at the condominium was amply corroborated by the evidence of Ibrahim bin Yaacob (PW24), who testified that on the day in question, he had directed PW1 to deliver an envelope to the respondent at the said condominium. This evidence was further corroborated by the image of PW1 arriving at the condominium at 14.47.44 which was recorded by the CCTV. The recording showed PW1 had arrived in a motor van bearing registration number WPK5925 which was registered in the name of the father of PW1's fiancée. PW1 was recorded taking the lift and another CCTV captured the image of PW1 exiting on the fifth floor at 14.42.56. PW1 was then seen entering the lift on the fifth floor and later was seen driving the same motor van leaving the compound of the condominium at 16.35.05. The learned trial judge had carefully evaluated the evidence regarding the times of the recordings and had accepted the evidence of PW10, Mohd Zabri bin Adil, who was the head of Digital Forensic Department of Cyber Security and the evidence of Mohd Sharizuan (PW11), an analyst with Cyber Security. His Lordship was satisfied and had accepted the explanation by these two witnesses regarding the real times of the events recorded on the hard disk of the CCTV.

[60] The learned trial judge referred to the recording of camera number four which showed a car bearing registration number WMK6 arriving at the condominium at 12.19.58. According to PW22, Ahmad Humaizi bin Awang, Head of the Record Unit of the Kuala Lumpur Road Transport Department, this car belonged to the respondent. Someone resembling the respondent was seen taking the lift from level P1 to the 5th floor and exited at the said floor. The same person was seen leaving the 5th floor and took the lift to level P1 and exited at the said floor at 17.14.54. The same car bearing registration number WMK6 was recorded leaving the compound of the condominium at 17.30.23. Based on these evidence, the learned trial judge found that both PW1 and the respondent were at the said condominium at about the same time of the alleged incident.

[61] The learned judge had drawn the irresistible conclusion that there was opportunity for the respondent to commit the offence at the place and time as charged. Having considered the evidence ourselves, we are in agreement with the learned trial judge when His Lordship concluded at para. 137 of the grounds of judgment which reads:

A [137] Based on the above evidence, I find the accused and PW1 were at the vicinity of the crime scene during the period mentioned in the charge. The presence of the accused at the vicinity of crime scene and the proximity of time to the commission of the offence showed there was opportunity for the offence to take place. More importantly they are corroborative evidence, lending support to the credibility of PW1's evidence.

[62] Concerning the issue of factum of penetration, the learned trial judge found corroboration from the evidence of PW3 Dr Siew and PW23, Dr Fazuin. Both PW3 and PW23 testified that PW1 had informed them that he was sodomised by a high profile public figure for at least two months and the last incident happened on 26 June 2008. PW1 also informed them that a lubricant was used and there was penetration as well as ejaculation. No condom was used.

[63] The crucial evidence which corroborated the evidence of PW1 on the factum of penetration is the evidence of the doctors Dr Khairul Nizam (PW2), Dr Siew (PW3), Dr Razali (PW4) and the chemist Dr Seah (PW5).

[64] PW2 and PW4 conducted the physical examination on PW1 in the presence PW3 and PW23. PW2 and PW4 conducted the anal examination. Swabs were taken from PW1 by PW2. Exhibit P6F was taken from the perianal region, exh. P6H and P6i were taken from high rectal region and exh. P6J was taken from low rectal region. These exhibits were placed in sealed receptacles which were in turn placed in a transparent plastic bag exh. P27. PW3 then handed over exh. P27 to the investigating officer (PW25) who in turn handed them over to the chemist, Dr Seah (PW5).

[65] PW5 analysed these exhibits and found the presence of sperm cells in exhs. P6F, P6H, P6i and P6J. PW5 further testified that semen containing spermatozoa found on swabs B7, B8 and B9 came from a single source referred to a 'Male Y'. PW5 prepared the report exh. P25.

[66] We now come to consider the identification of 'Male Y' as alluded to earlier. In this respect, the evidence of Aidora bt Saedon (PW6), another chemist attached to the Chemistry Department, is essential.

[67] PW6 developed the DNA profiles of 'Male Y' from exhs. P58A a white toothbrush, P59A a 'Good Morning' towel and exh. P61A an empty 'CACTUS' mineral water plastic bottle. These exhibits were collectively recovered by PW15, PW16, PW17, PW18 and PW20 from the lock-up cell in which the respondent was the sole occupant. After having conducted her analysis, PW6 found that 'Male Y' is the same contributor of the DNA retrieved from the exhibits recovered from the lockup. PW6 came to the conclusion that the contributor of the DNA and 'Male Y' is from the same source.

Corroboration In Sexual Offences

[68] In *Din v. PP* [1964] 1 LNS 33; [1964] MLJ 300 (FC), Thomson LP said that the need for corroboration in sexual offences springs not from the nature of the witness but from the nature of the offence. Corroboration of sexual complainant's evidence is required as a matter of practice and prudence. The judge has a discretion in insisting on the requirement of corroboration but the corroboration warning is required as a matter of law in cases where corroboration itself is dispensed with.

[69] The Privy Council in *Chiu Nang Hong v. PP* [1964] 1 LNS 24; [1965] 1 MLJ 40 held:

> ... where the trial judge had in mind the risk of convicting without corroboration but nevertheless decided to do so because he was convinced of the truth of the complainant's evidence, the judge should make it clear that he has the risk in question in his mind, but nevertheless is convinced by evidence, even though uncorroborated, that the case against the accused is established beyond any reasonable doubt. No particular form or word is necessary for this purpose; what is necessary is that the judge's mind upon the matter should be clearly revealed.

[70] This was the position taken by Augustine Paul, JC in *Aziz Muhamad Din v. PP* [1997] 1 BLJ 523; [1997] 1 CLJ Supp 523; [1996] 5 MLJ 473 wherein it was stated that generally in Malaysia there is no specific rule of law that requires the evidence of a witness to be corroborated except in the case of the evidence of a child of tender years under s. 133A of Act. However in certain types of cases there is a rule of practice which requires evidence to be corroborated. This includes the evidence of a complainant in a case involving sexual offence. Even in such cases, a conviction based on uncorroborated evidence is not illegal. But

A the rule of practice regulates the manner in which the uncorroborated evidence is to be treated, that is to say, the judge must warn himself of the dangers of convicting on such evidence.

[71] In *State of Kerala v. Kurissum Mottil Antony* [2007] AIR
B SCW 1509 the court had this to say:

> Corroboration is not the *sine qua non* for conviction in a rape case. The observation of Vivian Bose, J. in *Rameshwar v. The State of Rajasthan* (AIR 1952 SC 54) were, "The rule, which according to the cases has hardened into one of law, is not that
C corroboration is essential before there can be a conviction but that the necessity of corroboration, as a matter of prudence, except where the circumstances make it safe to dispense with it, must be present to the mind of the judge" ...

[72] It was further explained by the Supreme Court of India in
D *State of Maharashtra v. Chandraprakash Kewalchand Jain* AIR 1990 SC 658 that in cases involving sexual offences there is no absolute requirement that corroboration is required as follows:

> A prosecutrix of a sex-offence cannot be put on par with an
E accomplice. She is in fact a victim of a crime. The Evidence Act nowhere says that her evidence cannot be accepted unless it is corroborated in material particulars. She is undoubtedly a competent witness under s. 118 and her evidence must receive the same weight as is attached to an injured in cases of physical
F violence. The same degree of care and caution must attach in the evaluation of her evidence as in the case of an injured complainant or witness and no more. What is necessary is that the court must be alive to and conscious of the fact that it is dealing with the evidence of a person who is interested in the outcome of the charge levelled by her. If the court keep this in mind and feels
G satisfied that it can act on the evidence of the prosecutrix there is no rule of law or practice incorporated in the Evidence Act similar to illustration (b) to s. 114 which requires it to look for corroboration. If for some reason the court is hesitant to place implicit reliance on the testimony of the prosecutrix it may look for evidence which may lend assurance to her testimony short of
H corroboration required in the case of an accomplice. The nature of the evidence required to lend assurance to the testimony of the prosecutrix must necessarily depend on the facts and circumstances of each case. But if a prosecutrix is an adult and of full understanding the court is entitled to base a conviction on
I her evidence unless the same is shown to be infirmed and not

> trustworthy. If the totality of the circumstances appearing on the record of the case disclose that the prosecutrix does not have a strong motive to falsely involve the person charged the court should ordinarily have no hesitation in accepting her evidence.

[73] Closer to home in our own jurisdiction, in the case of *PP lwn. Mohamad Malek Ridhzuan Che Hassan* [2013] 8 CLJ 359, this court held that although there was no requirement in law that the evidence of a complainant in a sexual case required corroboration, however, the court has to scrutinise the testimony of the complainant with care to ensure that his or her testimony is safe to act upon. If the evidence from the complainant was "unusually convincing", a conviction in a sexual offence can be recorded without the need of corroborative evidence (see also *PP v. Mardai* [1949] 1 LNS 65; [1950] 16 MLJ 33).

[74] "Unusually convincing" has been explained in the case of *PP v. Mohammed Liton Mohammed Sayeed Mallik* [2008] 1 SLR(R) 601 at [39] as follows:

> ... testimony that, when weighed against the overall backdrop of the available facts and circumstances, contains that ring of truth which leaves the court satisfied that no reasonable doubt exists in favour of the accused.

[75] Mr Karpal Singh, learned counsel for the respondent submitted that the credibility of PW1 has been eroded by his delay in making his police report which was done only two days after the alleged incident. Learned counsel urged this court to revisit and reappraise the evidence of PW1. It was submitted that the conduct of PW1 after the alleged incident renders his evidence preposterous to be believed.

[76] We find that the learned trial judge had addressed this issue in his grounds of judgment. This is what His Lordship said at paras. 111, 112 and 113 of his judgment:

> [111] I find it is not tenable to use PW1's failure to escape when he had the opportunity, failure to seek help or failure to complain to security guard as indicative that the offence did not take place. Under normal circumstances, such failures would be construed to mean that the incident indeed took place but it was consequential which is not relevant in our case.
>
> [112] And in any event, PW1 was never asked to explain why he did not run, did not seek help from the occupier of unit 5-11-2, complain to security guard or make police report immediately.

A However from the established facts borne out by the evidence of SP1, it was not difficult to understand why PW1 had acted the way he did though he insisted he did not consented to being sodomised.

B [113] PW1 was a young man aged 22 years old under the employment of the accused. He was not just any employee but the accused's personal assistant who had to deal directly with the accused. PW1 idolised the accused since he was a child. He liked working with the accused and found him to be charismatic. The accused was generous with PW1 and PW1 was given special C treatment by the accused like presented with a suit even though he had just worked less than two months. He was given preferential treatment when he was allocated a room in the new office over more senior colleagues. The interview with the doctors in particular Dr. Razuin and from PW1 own evidence suggest the incident on 26 June 2008 was not something totally unexpected D as it had happened before. PW1 had reported to various people before but no one advised him to lodge police report and some were even sceptical. In fact the people like Ezam, Mumtaz and PW1's uncle even discouraged PW1 from lodging police report because they were concerned of PW1's future. The people in unit E 11-5-2 were all accused's friend.

[77] The learned trial judge concluded at para. 114 as follows:

Based on those facts and circumstances, PW1's failure to run away, to complain to people in unit 11-5-2 or to lodge police F report immediately is understandable. It could not be the basis to find PW1 to be an incredible witness.

[78] We wish to add that delay in the lodging of the police report is not by itself fatal to the case for the prosecution nor can delay itself create any suspicion about the truthfulness of the G version given by the informant just as a prompt lodging of the report may be no guarantee about its being wholly truthful. As long as there is cogent and acceptable explanation offered for the delay, it loses its significance.

H **[79]** Based on the above, we are unable to agree with the submissions advanced by the learned counsel that the evidence of PW1 is not convincing and unreliable. On the contrary given the evidence above, and adopting the test in *PP v. Mohammed Liton Mohammed Sayeed Mallik (supra)*, we are of the considered opinion I that the evidence of PW1 is indeed unusually convincing.

[80] In the light of the above, even if assuming that there is no corroboration to support the evidence of PW1 on the factum of penetration, which we find is not the case here, it is safe to convict the respondent. Furthermore there are other ample evidence from which the element of the charge can be confirmed and proved.

Integrity And Chain Of Evidence In Relation To The Exhibits

[81] We now turn to consider the issue of tampering, contamination and degradation of the samples.

[82] Learned counsel contended that the integrity of the samples had been compromised by the alleged tampering by PW25 on exh. P27. Learned counsel vigorously challenged the integrity and chain of evidence contending that the manner of handling of exhibits by PW25 was unsatisfactory which raised the probability that the integrity of the evidence had been compromised. The defence went so far as to insinuate that the exhibits in the plastic bag marked as exh. P27 had been tampered with by PW25.

[83] Learned counsel for the respondent contended that PW25 was an unreliable witness whose credibility is questionable due to the fact that he had been found to be not telling the truth in the 'SUHAKAM Public Inquiry Into The Arrest And Detention of Five Lawyers of the Kuala Lumpur Legal Aid Center'. The challenge on the credibility of PW25 was pursued by the filing of a motion by the defence to recall PW25 which this court had dismissed and the appeal to the Federal Court had also been dismissed.

[84] The evidence on record revealed that the samples taken by the doctors from PW1 were immediately placed in sterilised air tight containers which were sealed, labelled, dated and signed by both PW3 and PW1, and were placed in a sealed plastic bag (exh. P27) before being handed over to PW25 who then handed the samples over to PW5 for examination. Before handing over the samples (exhs. P6A to P6L) to PW5, PW25 cut open P27 and took out the containers and put them into individual envelopes and each envelope was respectively marked by PW25 as 'B', 'B1', 'B2', 'B3', 'B4', 'B5', 'B6', 'B7', 'B8', 'B9', 'B10' and 'B11' (exhs. P31 - P42). All the envelopes were sealed with the 'PDRM 330' seal and kept by PW25 in a locked steel cabinet in his office at the Police Contingent Headquarters, Kuala Lumpur before being handed to PW5. PW5 in her evidence confirmed that the

A seals on the containers were intact and had there been any indication of tampering of the containers, she would have recorded it in her report.

[85] On the insinuation by the defence that PW25 had B tampered with the exhibits, we do not find that the act of PW25 in cutting open exh. P27 amounts to tampering of the exhibits. We have noted the explanation given by PW25 that in doing so, he was merely complying with the IGSO. It must be borne in mind that s. 114 illustration (e) of the Evidence Act 1950 provides C that the court may presume that judicial and official acts have been regularly performed. In *State of Punjab v. Rameshwar Dass* [1975] Cri LJ 1630, the Punjab & Haryana Court held at p. 1631 as follows:

> D It is well settled that *prima facie* the public servants must be assumed to act honestly and conscientiously. It would, therefore, be basically wrong, without other cogent ground to consider them as untrustworthy witness in respect of their activities in performance of their official duties merely because of their official status unless the evidence is considered to be suspicious and that E the conviction of the accused cannot be sustained on the statements of the official witnesses. The presumption that a person acts honestly applied as much in favour of a police officer as of other persons, and it is not a judicial approach to distrust and suspect him without good grounds.

F **[86]** In this instance, and to conclude on this issue, it would be opportune to state what the learned trial judge had concluded on the suggestion of the defence on the issue of tampering. At paras. 181 and 182 of the judgment, the learned trial judge stated:

G

> [181] Another issue raised by the defence was tampering of evidence by the investigating officer when he opened the plastic package which was heat sealed containing specimens collected from PW1. Counsel submitted this was done with the sole purpose to tamper with the swabs taken from PW1's rectum.

H

> [182] Regarding this issue, it is important to remember that the DNA profiles which PW5 "Male Y" was obtained from sperm extract. These profiles were found to match the profiles of DNA found on items collected from the cell occupied by the accused. Most importantly was the fact the items from the cell were I collected and handed to investigating officer on 17 July 2008. By that time the samples taken from PW1 was already with PW5 at the chemistry department. The said samples were handed to PW5

> on 30.6.2008. Therefore there was no way for the investigating officer to use the DNA samples obtained from the cell to tamper with the samples collected from PW1, if that what the defence was suggesting. In any event, the DNA profiles from the items found in the cell was contact DNA whereas the one on the high and low rectal swabs of PW1 was from seminal extract. As submitted by learned senior DPP, where was the investigating officer going to get the seminal sample which was subsequently found to match the profile of DNA samples swabbed from items used by the accused.

[87] We do not see how the learned trial judge could be faulted in his findings. Tampering and the possibility of tampering of the samples by PW25 and also contamination were not proven. In our considered opinion the contention that PW25 had tampered with the exhibits in P27 is devoid of any merit.

[88] Concerning the submissions by learned counsel for the respondent that the items recovered from the cell occupied by the respondent were illegally obtained, the learned trial judge held that the arrest of the respondent was lawful. Therefore, the detention of the respondent in the cell could no longer be said to have been done for the sole purpose of obtaining DNA evidence from him by tricks as alleged by the defence. In those circumstances the court had exercised its discretion to allow those items collected from the cell and all evidence related to those items to be tendered as evidence.

[89] Even if such items were obtained illegally as alleged by the defence, it is admissible in law. In *Hanafi Mat Hassan v. PP* [2006] 3 CLJ 269; [2006] 4 MLJ 134 Augustine Paul JCA had this to say:

> It is therefore clear that the court has no discretion to refuse to admit evidence on the ground that it was illegally obtained if it is relevant. This rule applies, *inter alia*, to cases involving illegal searches, evidence obtained by secret listening devices or by undercover police operations. It also applies to evidence obtained by unfair procedures. Thus in *R v. Apicella* [1986] 82 Cr App 295, the English Court of Appeal upheld a rape conviction based upon the results of tests carried out on specimens of body fluid obtained from the accused for medical reasons while he was on remand. In *AG for Quebec v. Vegin* [1955] SCR 593, it was held that even if a blood sample was obtained from the accused without his consent it is admissible to prove intoxication. It follows that

A the evidence relating to the blood sample taken from the second accused is admissible as it is relevant even if it taken without his consent.

(see also *Kuruma v. R* [1955] AC 197; [1955] 1 All ER 236).

B **[90]** Therefore, the submission of learned counsel for the respondent on this issue is devoid of any merit and must fail.

Degradation Of Samples

C **[91]** On the issue of degradation of samples, it was contended by the defence that the finding of PW5 was inconsistent with the history of the case in that it was unlikely that traces of semen could be retrieved after 36 hours of sexual assault. Given the history, PW5 conceded that degradation could be expected. At p. 1027 of the appeal record, during cross examination PW5 D testified as follows:

S: The alleged incident took place on the 26th June at about 3.00 o'clock, close to 4.00 o'clock, 3.45. The examination in HKL took place on the 28th June, two days later at E approximately 9.45p.m. for about 3 hours. That's about 54 to 56 hours. You got a situation here, where the ejaculation that remained in the anus for about 56 hours. That's quite a long time, isn't it?

J: Yes.

F

S: In such a situation, that being the case, bearing in mind 56 hours, would you expect to see degradation in the sperm and the DNA in a situation like this? It has been ejaculated into an anus which remains there not for a day, not for 2 days, more than 2 days, 56 hours it's that. There are all G sorts of conditions instead. It's reasonable to expect degradation?

J: Yes that would be.

S: Another words, the quality of that sperm and DNA would H be reasonably expected to deteriorate?

J: Yes.

S: That's what we mean by degradation?

I S: Yes.

[92] Learned DPP conceded that samples of this nature would degrade to a certain degree. Both PW5 and PW6 have considered that there would be degradation of samples in this case. However, no one can tell the extent of degradation until and unless examination, test and analysis are conducted on the samples. In this case, not only was PW5 able to detect the presence of semen on the samples but she was also able to observe under a microscope the presence of sperm cells, non-sperm cells and bacteria in the stain which she had placed on the slides. Subsequently, from those samples, PW5 was able to extract full DNA profiles, in particular, from swabs B7, B8 and B9, taken from the low and high rectal regions of PW1. DNA from both the respondent and PW1 were found.

[93] In such circumstances, the pertinent question to be asked is whether, notwithstanding degradation, was PW5 and PW6 able to extract good DNA profiles? In one literature titled '*Dealing with DNA evidence: A legal guide*' by Andrei Semikhodskii, it is stated as follows:

> DNA is stable and reliable data can be produced from very old and decayed biological samples. DNA is more robust than proteins when subjected to harsh environment and is capable of withstanding both natural and man-made injury. The high molecular integrity of DNA allows forensic scientists to analyse long-buried samples as well as samples that have been subjected to high temperatures and chemical treatment. Even when biological material is severely degraded, DNA evidence can still be produced using modern forensic approaches.

[94] In *R v. Butler* [2001] QCA 385, the brief facts are that one Mrs Douty was murdered probably on 1 September 1983 when she was sunbaking on a beach at Brampton Island. Her body was discovered in some undergrowth in a place called Dinghy Bay, unclothed but covered with a red towel. The red towel was found to have both blood stains and semen stains on it. The sole evidence on which the appellant was convicted, apart from the fact that he had an opportunity to kill the deceased, was DNA evidence from his semen found on the red towel. The appellant did not give evidence. The DNA tests, which it was said to prove this, were done in February 1997. One of the grounds raised by the defence was that over 13 1/2 years between the murder and the DNA analysis, the towel had been in a number of places and

A that there was no satisfactory evidence on the condition in which, at all times, it had been kept. Consequently, it was submitted, factors such as moisture, sunlight or heat could have so degraded the sample of semen from which the DNA was said to have been extracted that it was impossible to extract DNA from it.

B

[95] The court rejected the submissions. The court had this to say:

> [25] In the first place a period of 13 1/2 years is not, in DNA terms a long time. Good results have been obtained 20 or 30
C years after the event and Dr Budowle even gave the example of DNA extracted from bones 60,000 years old. If the substance containing it is dry and out of sunlight it will not degrade for many years.
>
> [26] Secondly, there is nothing to indicate that any of the
D conditions which could have caused even partial degradation, in particular moisture or heat or direct sunlight, existed in respect of the towel at any time. It was dry when Mr Freney took possession of it two days after the murder and it was always kept dry, indoors and, it seems, in a plastic bag, *albeit* with other
E things.
>
> [27] Thirdly, one of the advantages of the process by which DNA is extracted, so Dr Budowle said, is that unlike earlier processes such as the ABO process referred to later, partial degradation does not prevent good results from being obtained. That is because,
F unlike the other processes, it focuses on very small portions of the DNA, a few hundred letters long at the most. These may be mere fragments of DNA.

[96] Dr BR Sharma in his book *'Forensic Science In Criminal Investigation & Trials'* 4th Edition at p. 1118 states as follows:
G

> 6. The quantities of the DNA required for analysis are extremely small, in micrograms. In recent times the requirements have become even less, due to amplification of material clues through cell regeneration, technology – Polymerase Chain Reaction (PCR).
>
H 7. An important advantage of DNA profiling is that the contamination of evidentiary clues by similar biomaterial may increase the difficulties but do not prevent the identification significantly.

I **[97]** In the same vein, Jane Moira Taupin in *'Introduction to Forensic DNA Evidence For Criminal Justice Professionals'*, CRC Press states at p. 18 that "The polymerase chain reaction (PCR) was a

boon for forensic science, as it enables the analysis of minute quantities of blood and semen and is effective for degraded samples such as those commonly encountered at crime scenes. PCR is essentially a molecular photocopier that can amplify very small samples and allow them to be detected and analysed.". A

[98] In *States & Others v. Jyotish Prasad & Others* LNIND 2009 DEL 799, the High Court of Delhi held that: B

> While, as a hypothesis, it may be stated that a vaginal swab kept in an unrefrigerated condition would be subject to degradation, but that has to be established as a fact. In the present case, the DNA analysis report does not indicate that the vaginal swab Exhibit-PW-14 obtained from the deceased had deteriorated to such a condition or, at all, which did not permit them to do DNA profiling in respect thereof. C

[99] Further literature on this subject referred to us by the learned DPP includes an article from the *British Journal of Venereal Diseases* (1972) 48, 141 written by AI Morrison with the heading '*Persistence of Spermatozoa in the Vagina and Cervix*'. Learned author of the said article referred to the book edited by Smith and Cook wherein it was stated that 'spermatozoa may remain in the posterior fornix as long as 17 days, and may survive a menstrual period'. The said author also referred to the British Medical Journal (1964a) where it was stated 'live sperms have been found in the cervix three days after coitus'. In the research carried out by AI Morrison involving 104 women, sperms were found in the cervix up to twelve days after coitus and in the vagina up to nine days after. D E F

[100] The evidence of PW5 clearly shows that the deterioration of the samples in the instant case was not to such an extent which did not permit her to do DNA profiling. Hence, the finding by PW5 of sperm cells in the complainant's anus 56 hours after the incident of sodomy is not unusual. In the light of the above, we have no hesitation to conclude that both PW5 and PW6 were able to obtain perfect DNA profiles which connected the respondent with the offence charged. G H

[101] We have perused the evidence on record carefully and we are in full agreement with the learned trial judge that the prosecution had succeeded in establishing a *prima facie* case against the respondent. We are satisfied that the learned trial judge has undertaken a maximum evaluation of the evidence adduced and had come to the correct conclusion. I

The Appeal

[102] Before us, learned DPP submitted that the learned trial judge had erred in law and fact in deciding that the defence had succeeded in raising a reasonable doubt in the prosecution's case. In support of his submissions learned DPP raised the following issues:

(a) burden of proof/standard of proof;

(b) chain and integrity of exhibits;

(c) corroboration;

(d) statement from the dock;

(e) alibi; and

(f) opposing expert testimonies.

[103] Issues (a), (b) and (c) have already been dealt with above. Therefore, what needs to be considered are the remaining issues, namely; statement from the dock, alibi, and opposing expert testimonies.

Statement From The Dock

[104] A statement from the dock is evidence but it is not entitled to the same weight as sworn testimony. A statement from the dock must relate to the events pertaining to the charge (*PP v. Karim Othman* [1994] 2 CLJ 826; *R v. Dunn & O'Sullivan* [1922] 17 Cri App R 12).

[105] In *Mohamed Salleh v. PP* [1969] 1 MLJ 104, the appellant was charged for murder. Upon his defence being called, he made an unsworn statement from the dock. On this aspect, the trial judge directed the jury in the following terms:

> The accused, as you know, did not give evidence on oath. He made a statement from the dock and he could not be cross-examined by the prosecution, he could not be questioned by me, he could not be questioned by you. Members of the Jury, you will naturally not be inclined to give so much weight to what he said in the dock as you would if he gave evidence, because when a man gives evidence one can cross-examine on it and test it and generally have a much better opportunity of assessing it. Of course, you must reject the statement of the accused, you must consider it and give it such weight as you think it is worth having regard to the other evidence that you have.

[106] On appeal, the appellate court held that the direction was proper and the appellant was not prejudiced.

[107] In our view, the trial judge in the instant appeal could quite properly wonder why the respondent had elected to make an unsworn statement; that it could not be because he had conscientious objection to taking the oath since, if he had, he could affirm. Could it be that the respondent was reluctant to put his evidence to the test of cross-examination? If so, why? He had nothing to fear from unfair questions because he would be fully protected from this by his own counsel and by the court.

[108] For the respondent to succeed in his defence, it is incumbent upon him to adduce evidence which can answer the allegations in the charge. In this case, the respondent did not even deny that he was at the scene of the crime at the material time and date as stated in the charge. He never disputed that his car was seen entering and leaving the condominium at the material time. He also did not dispute that he was seen entering the lift to the 5th floor of the condominium and later leaving the place. He also did not dispute that he had directed his chief of staff, PW24 to arrange for an envelope to be handed over to him at the said condominium and that PW24 had instructed PW1 to bring the envelope to him. The respondent also did not dispute the fact that PW1 had brought the envelope to him at the place of the incident. The learned judge found that the respondent's statement from the dock is a mere denial with which we fully agree. The bare denial by the respondent does not amount to any doubt whatsoever. A credible defence is one that answers the evidence thrown at it by the prosecution. It is also imperative that the respondent explain his case.

Alibi

[109] As we have noted earlier, the respondent's line of defence was an alibi of which he had given notice before the commencement of the trial. But at the trial, it appears that this defence was never pursued for reasons best known him. It is pertinent to note that an alibi represents a complete defence to exculpate the respondent from the offence charged.

[110] It was submitted before us by the DPP that the failure of the respondent to proceed to call any witnesses to support his defence of alibi raises questions on the *bona fides* of his defence. Generally, we agree with the submissions of learned counsel for

the respondent that no adverse inference can be drawn against an accused person in a criminal trial. There is no duty upon an accused person to call any evidence. He is at liberty to offer evidence or not as he thinks proper and no inference unfavourable to him can be drawn because he adopts one course rather than other (see *Illian & Anor v. PP* [1988] 1 LNS 139; [1998] 1 MLJ 421, and *Goh Ah Yew v. PP* [1948] 1 LNS 13; [1949] MLJ 150).

[111] The appellant in the Australian case of *Norman John Rose* 69 A Crim R p. 1, had given an alibi notice but failed to call the alibi witness Mr Les Ferguson. The trial judge directed the jury that in the absence of explanation, they could draw the inference that his evidence would not have assisted the defence case. On the failure of the appellant to call Mr Ferguson, Mullighan J remarked:

> I am not saying that you may draw an inference adverse to the accused; for you to do so would be quite wrong, and it would breach both a fundamental rule of the criminal law regarding onus of proof, and the basic right of the accused at his trial to say nothing if he so chooses; all I am saying is that you may - I emphasis the word "may", and do not say "must" - you may draw an inference that Mr Ferguson's evidence could not have assisted the defence case regarding alibi. Apart from that, you should not speculate as what he might or might not have said had he been called to the witness box.

[112] Likewise, we share the sentiments that the court may draw an inference that the evidence of the alibi witnesses could not have assisted the defence. It is of interest to note that among the witnesses named in the notice of alibi was the respondent's own wife and also his chief of staff. These witnesses in particular, would have been available and were at the respondent's disposal had his alibi been genuine.

Opposing Expert Testimonies

[113] The two expert witnesses called by the defence to contradict and rebut the prosecution's expert witnesses were Professor David Lawrence Wells (DW2) and Dr Brian Leslie McDonald (DW4). These two witnesses were called merely to give their opinion on the evidence and the reports prepared by the two chemists, PW5 and PW6.

[114] Starting with the evidence of DW2, his evidence touched on exh. P22 which was a report prepared by PW2, PW3 and PW4. He criticised the report as lacking in particulars, the

omission to state the date when the samples were taken and the errors in dates on certain exhibits. To be fair to him, we note that he conceded to the fact that it is not his role to dispute the positive findings by PW5. An opinion was expressed by PW2, PW3 and PW4 in the said report on the factum of penetration based on the findings of PW5 who found samples taken from the complainant rectum to bear 'Male Y DNA'.

[115] According to the evidence of DW2, it was wrong for PW2, PW3 and PW4 to give their opinion on the factum of penetration based on the findings of PW5. We note that the evidence of DW2 is merely a criticism of the methods adopted by PW2, PW3 and PW4 in reaching their conclusion. The learned trial judge had found that there was "nothing objectionable for PW2, PW3 and PW4 to do so". His Lordship was right in so holding. However, His Lordship had erroneously and totally disregarded his ruling. We shall elaborate further and say why.

[116] In his testimony, DW2 also suggested the samples could be contaminated and the respondent's DNA was planted.

[117] Both DW2 and DW4 testified that it was unlikely that any trace of semen could be retrieved after 36 hours of sexual assault. Commenting further on the evidence regarding the retrieval of the semen which took place 56 hours after the alleged offence was committed, both DW2 and DW4 shared an opinion that it would be very unlikely any sperm cell could be retrieved from the complainant's rectum. Active bacterial action in the rectum for 54 to 58 hours would have degraded the specimen.

[118] These two defence experts were further of the opinion that the action of PW25 in not following the instruction given by PW3 as to the safekeeping of the samples had compounded the degradation of the samples. The samples were not stored in a freezer as instructed and they went so far as saying that this was a sure way of destroying any trace of DNA on the samples. Both DW2 and DW4 also made comments about the sample being purportedly in pristine condition.

[119] Faced by the above evidence, the learned trial judge concluded that the result of analysis done by PW5 could not be reconciled with the expert evidence of these two witnesses and asked himself the question which expert was right?

[120] In trying to answer the question, the learned trial judge had re-examined the evidence of PW3 who collected the samples at the Kuala Lumpur General Hospital and put them individually in plastic containers labelled and sealed with the Kuala Lumpur Hospital seal and placed them in the plastic bag P27. This plastic bag P27 was then handed over to PW25 who then subsequently cut open P27 to relabel the containers. With this, the learned trial judge concluded at para. 205 of his judgment:

> By cutting open P27, the confidence in the integrity of the samples was gone.

[121] His Lordship had come to this conclusion after having accepted the evidence of DW2 who stated that the containers were not tamper proof. DW2 came to this view merely by looking at the containers in court and gave his opinion solely from the manner in which these containers were sealed and the type of material used as seals. That was merely his opinion pure and simple.

[122] It is crystal clear that the learned trial judge was simply overwhelmed by the evidence of these two expert witnesses called by the defence. We find that His Lordship had overlooked the testimony of DW2 under cross-examination regarding the issue of tampering of the containers where DW2 admitted that he could not say that there had been tampering of the containers (see p. 2234 appeal record). In cross-examination, DW2 answered as follows:

> S: Would you say that the containers were tampered?
>
> J: No, I can't. All I was saying yesterday is that this is the container that if any tampering occurred, it would be evident to others ...

[123] In the light of the above, we find that the testimony of PW5 that there was no tampering of the containers remained intact. We also find that it was never the prosecution's case that the samples were in pristine condition.

[124] It has been said in many high authorities that judicial reception of evidence requires that the oral evidence be critically tested against the whole of the other evidence and the circumstances of the case. Plausibility should never be mistaken for veracity (see *Tindok Besar Estate Sdn Bhd v. Tinjar Co* [1979] 1 LNS 119; [1979] 2 MLJ 229, per Chang Min Tat FJ).

[125] On a similar note, the Federal Court in *Lee Ing Chin & Ors v. Gan Yook Chin & Anor* [2003] 2 CLJ 19; [2003] 2 MLJ 97 had stated:

> We must also test the evidence of a particular witness against the probabilities of the case. A trier of facts who makes finding based purely upon the demeanour of a witness without undertaking a critical analysis of that witness's evidence run the risk of having his findings corrected on appeal.

[126] We would add that the obligation of a trial judge to deliver reasons which sets out the basis of his decision in accepting or rejecting the evidence is mandatory.

[127] Horne J had observed in *Murugiah v. PP* [1940] 1 LNS 59; [1941] 10 MLJ (FMSR) 17 Magistrates do not comply with s. 307(iii) of the Criminal Procedure Code which requires them to give the "grounds of decision" by stating "I believe the evidence of the prosecution ... I believe the evidence of the accused." The learned judge went on to say at p. 18:

> I think the Magistrate should state, except in the simplest of cases and they usually are not the subject of appeal, the reasons why he believed or disbelieve the evidence in question.

[128] An appellate court has jurisdiction to review the record of the evidence in order to determine whether the conclusion reached by the trial judge should stand. We are at the same time mindful of the fact that this jurisdiction has to be exercised with caution.

[129] Having these principles in mind, it is our considered view that in accepting or rather preferring the evidence of the two defence experts, the learned trial judge had failed to carry out a critical examination of their evidence and test it against the whole of the other evidence and the circumstances of the case. It is incumbent on the part of the learned trial judge to indicate in his judgment that this process of appraisal and critical evaluation of the evidence had been undertaken. Failure to do so invites appellate intervention.

[130] In accepting the evidence of the expert witnesses, the learned trial judge had failed to consider that in terms of the probative value of the evidence, the evidence of PW5 ought to have been held to be more credible in the sense that PW5 had herself carried out the various tests and analysis of the samples as opposed to both DW2 and DW4 who did not have the benefit of doing the analysis themselves. The evidence of both DW2 and

DW4 are mere opinion as opposed to the evidence of both PW5 and PW6 which were factual and based on their own analysis of the samples. Both DW2 and DW4 are mere "arm chair experts". In terms of qualifications, the learned trial judge had found PW5 to have impeccable credential, holding a PhD in Forensic DNA and is the head of the Serious Crime Unit, Chemistry Department Malaysia. So too PW6, whom the learned trial judge had found to be without doubt an expert in DNA analysis and competent in terms of her academic and professional qualifications and experience.

[131] On the method of analysis, His Lordship had also found and accepted that PW5 had conducted the DNA analysis using the latest technique. DW4 on the other hand last did DNA analysis in the lab in 2004 and his expertise seem to be limited to the interpretation of results of DNA analysis only. This was by way of his own admission. In giving his evidence, DW4 imparted his knowledge not gained from personally having conducted the test and analysis (p. 2541 appeal record), but only by reading a manual on DNA extraction protocol issued by AB1 (see p. 2543 appeal record). That being the case, it is understandable why DW4 could not appreciate the evidence of PW5's explanation in respect of the method of extraction she carried out because DW4 had never personally conducted the procedure before.

[132] It is trite that an expert witness must give reasons for his conclusions (see *PP v. Loo Seng Yip* [2004] 8 CLJ 496). Both PW5 and PW6 had testified in detail on the analysis done and the reasons for their conclusions reached. We are not sure whether DW2 and DW4 were able to match up with that since their conclusions were derived mainly from textbooks and journals in forming their opinions. How much weight ought to be given to such evidence? This was not considered by the learned trial judge.

[133] In dealing with expert witnesses, a trial judge must look for guidance in a passage from the judgment of Hashim Yeop Sani FJ sitting as a High Court Judge in *Dato' Mokhtar Hashim & Anor v. PP* [1983] 2 CLJ 10; [1983] CLJ Rep 101; [1983] 2 MLJ 232 at p. 256. It says:

> Human judgment is fallible and human knowledge is limited and imperfect. Moreover it is also not uncommon that an expert witness, however impartial he may wish to be is likely to be unconsciously prejudiced, in favour of the side which calls him. This is the area of caution that the court must always bear in mind in assessing the evidence of an expert.

[134] The defence in *Datuk Mokhtar Hashim*'s case called one Mr George Fassnacht (DW43) to challenge the evidence of the chemist, PW9 Mr Gee. Mr George Fassnacht was called as a firearms identification expert. He stated his qualification as having a BA Degree in Government from La Salle College and his experience consisted of his posting in Aberdeen Proving Grounds in the United States, three years with the CIA and one year with the Government in Singapore dealing in 'intelligence and technical' aspects of firearms.

[135] The judge found the evidence to have consisted entirely of criticising the methods used by Mr Gee and the police. His evidence also consisted entirely on the alleged failure of Mr Gee to ensure that he obtained the best available specimen for examination and comparison. At p. 240 of the report the learned judge concluded:

> Mr Fassnacht only visually examined slug A. I find Mr Fassnacht's evidence neither acceptable nor wholesome enough to cast any doubt on the veracity of Mr. Gee's evidence.

[136] The learned judge also made a remark that Mr Fassnacht is a self-styled "private firearms expert" from the USA.

[137] While the court refused to act on the evidence of a self-styled "private firearms expert" in the *Datuk Mokhtar Hashim*'s case, likewise the learned trial judge in the instant appeal should not have readily accepted the evidence of the two "arm chair experts" of the defence to cast a reasonable doubt in the prosecution's case. We see too close a resemblance between the expert evidence of Mr Fassnacht and the two experts in this appeal.

[138] In a similar vein, Winslow J in *Ong Chan Tow v. Regina* [1963] 1 LNS 88; [1963] 1 MLJ 160 had the following to say on an expert who had no first hand knowledge or experience on the matter:

> The learned District Judge also rejected the evidence of the expert on the ground that it was extremely biased against the prosecution and bordered on the ridiculous as he was basing his opinion on 2 visits to the scene long after the accident and after examining the same materials as were already before the court. The learned District Judge held that the factual evidence was a simple and straight forward nature and with this I cannot agree.

[139] The Supreme Court of India in *Piara Singh & Ors v. State of Punjab* [1977] AIR SC 2274 on p. 2277 also made an observation on conflicting evidence from expert. It says:

> What has happened is that two experts, namely Dr. Jatinder Singh and Dr. Paramjit Singh had difference in their opinions. The High Court rightly observed that in view of difference of opinion between the two experts the evidence of Dr. Jatinder Singh must be preferred as it is supported by the evidence of the eye-witness whose evidence is both reliable and trustworthy and is also supported by other circumstances proved in the case. It seems to us that where there is a conflict between the opinions of two experts the Court should normally accept the evidence of the expert whose evidence is corroborated by direct evidence of the case which according to the court is reliable.

[140] It is trite that the court is entitled to accept the opinion of an expert on its face value, unless rebutted by another expert to contradict the opinion (see *PP v. Lam San* [1991] 3 MLJ 426, *Munusamy Vengadasalam v. PP* [1987] 1 CLJ 250; [1987] CLJ (Rep) 221; [1987] 3 MLJ 492).

[141] The issue is whether the opinion given by DW2 and DW4 on the evidence of PW5 and PW6 are evidence in rebuttal. Again, evidence in rebuttal must be credible evidence and has high probative value. Considering the nature of the evidence proffered by these two defence experts, with due respect, we must say that the evidence is lacking in its probative value for the reasons we have adumbrated earlier.

[142] We agree with the submissions of the learned Deputy Public Prosecutor that the evidence of DW4 particularly, was to a great extent speculative and theoretical if not hypothetical, thus lacking in probative value. As succinctly stated by the Supreme Court of India in *Punjab Singh v. State of Haryana* [1984] AIR SC 1233 at p. 1234:

> If direct evidence is satisfactory and reliable the same cannot be rejected on hypothetical medical evidence.

[143] The learned Deputy was also very critical of the manner in which DW4 gave his evidence. Strong words were used by the learned Deputy. DW4 was alleged to have made wild comments and insinuations on the processes carried out by PW5 in her analysis to be merely jobs done by robots in his country. This was

highly questionable and deceitful according the learned Deputy. DW4 had also insinuated that the Chemistry Department is not accredited and that the accreditation had expired in 2005.

[144] We find merits in the criticisms of the learned Deputy against DW4. The evidence of Mr Lim Kong Boon (DW5) showed that the Chemistry Department was and is fully accredited as evident from exhs. D90 and D92. We find that the insinuation by DW4 was mischievous, to say the least.

[145] It was further submitted before us that the credibility, expertise, credential and objectivity of DW4 had been called into question. The learned Deputy referred to *Ms Robert Charles Bropho v. The State of Western Australia* [2007] WAOC 77 where the credibility and credential of DW4 was called into question. In the said case, Goetze DCJ had remarked:

> Dr McDonald was cross-examined as to whether he was actually a Fellow of the Australian Academy of Forensic Sciences. It was suggested, that, the Academy does not provide for fellowship. Whether that is so or not has not been proved. Dr McDonald accepted fellowship of such Academy is not an academic qualification, but rather, an affiliation, which should have not been listed in a separate section relating to affiliations. Further in cross-examination, Dr McDonald conceded that he is not a Fellow of the Australian College of Legal Medicine, but, he had claimed such fellowship as an affiliation in his curriculum vitae because both that college and the Australian College of Bio-Medical Sciences of which he is a Fellow, now run concurrent meetings (T226). He did not see that this misrepresented his affiliations within his curriculum vitae. These concessions by Dr Mc Donald impact upon his credibility.

[146] The judge in that case also took issue with Dr McDonald's expertise as an expert at p. 17 of the judgment as follows:

> At the end of Dr. McDonald's evidence-in-chief, I did not know from whom or from where Dr McDonald obtained his claimed expertise in DNA and molecular genetics. I did not know what it is that Dr. McDonald knows or does not know about DNA and genetics, and importantly, about population statistics, which he regarded as a "rather esoteric little classification" (T203)"

[147] Further down the pages of the judgment, the same judge made further comments on Dr McDonald's expertise and the manner he presented his expert opinion. At p. 26, the judge concluded:

> This explain why Dr McDonald is not an expert. He does not have the expertise to derive and validate a subpopulation model. He cannot follow the derivations in such model. He has not attempted to follow the derivation of the subpopulation model used by Dr Buckleton in this case (T237). However, when he looks at the observed profiles, he says that the model prepared by Dr Buckleton is "flawed" (T237).

[148] Likewise in the instant case, DW4 had criticised the conclusion drawn by PW2, PW3 and PW4, and the analysis by PW5 and PW6 as flawed.

[149] An appellate court will not hesitate to intervene if there is no evidence to support a particular conclusion or where the evidence as a whole cannot reasonably be regarded as justifying the conclusion arrived at the trial. A trial judge is not infallible in determining which witness is telling the truth or refraining from exaggeration bearing in mind that some witnesses may be partisan.

[150] In our view, the comments and the criticisms by the two expert witnesses of the defence pertaining to the evidence of PW5 and PW6 on their analysis and the three doctors who prepared the report in Exhibit P22 has no probative value as to cast a reasonable doubt on the prosecution's case. The learned trial judge had erred in concluding that the evidence of these two expert witnesses had shown the possibility of the samples taken from the complainant to have been compromised and the results of the DNA analysis by PW5 to be unsafe to be relied upon, thus the absence of any corroborative evidence on the factum of penetration.

Conclusion

[151] A reasonable doubt does not mean some light, airy, insubstantial doubt that may flit through the mind of a judge about almost anything at any time or other, it does not mean a doubt begotten by sympathy out of reluctance to convict, it means a real doubt, a doubt founded upon reason. "Proof beyond a reasonable doubt" does not mean proof beyond a shadow of doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence, "of course it is possible but not in the least probable," the case is proved beyond reasonable doubt but nothing short of that will suffice (see *K Gopal Reddy v. State of Andhra Pradesh* 1979 AIR 387, 1979

SCR (2) 265). [152] And in *Liew Kaling & Ors v. PP* [1960] 1 LNS 60; [1960] 21 MLJ 304 which made reference to *Miller v. Minister of Pensions* [1947] 2 All ER 372, the court speaking on the degree of proof to constitute a reasonable doubt said: A

> The degree of proof need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of doubt ... B

[152] We are always mindful that an appellate court should be very loath to upset a trial judge's finding based on the assessment and credibility of witnesses. But, when the trial judge has failed to C perform his statutory duty and has failed to make proper use of the opportunity of the advantage he has in the assessment of the testimony of the witnesses, it gives rise to a situation that necessitates this court to interfere and prevent a miscarriage of justice. The case of *Dr Shanmuganathan v. Periasamy Sithambaram* D *Pillai* [1997] 2 CLJ 153; [1997] 3 AMR 3012; [1997] 3 MLJ 61, is an illustration where an appellate court intervenes purely on the ground that there is any or insufficient judicial appreciation of conflicting oral testimony.

E

[153] In *State of Rajasthan v. Hanuman* AIR [2001] SC 282, 284, Mohapatra J, delivering the judgment of the Supreme Court of India held that:

> [An] appellate Court should assess the evidence on record with a view to satisfy itself that the appreciation of evidence by the trial Court is not vitiated on account of any erroneous approach or illegality and it is not palpably erroneous. The sustainability of the judgment depends on the soundness of the reasons given in support of the findings and the conclusion. F

G

[154] We are of the view that had the learned trial judge undertaken a critical analysis of the evidence of these two expert witnesses, His Lordship would in all certainty have not mistaken plausibility for veracity. Our perusal of the learned trial judge's grounds of judgment fail to find any evidence where His Lordship H had even considered the credibility of the defence witnesses in particular the evidence of DW2 and DW4. The learned trial judge turned an indulgent eye upon the evidence of DW2 and DW4 when he should have treated them with caution. There was a total failure of any observation with regard to credibility. Narrating the I evidence of the witnesses will not suffice and it does not amount to evaluation or appreciation of the evidence, let alone critical analysis.

[155] Of no less serious error on the part of the learned trial judge, was the failure to reason out the basis for his acceptance and preference for these two defence experts which is an integral part of the analysis and evaluation of evidence by a presiding judge.

[156] In our considered view, the learned trial judge fell into serious error when he doubted the integrity of the samples based on the evidence of the two expert witnesses called by the defence.

[157] The finding of the learned trial judge is seriously flawed and merits our intervention. In our view, the reception by the learned trial judge of the defence expert witnesses' evidence is not objective and is one sided. This is a serious error and falls far short of the proper approach that a judge should take when judicially appreciating evidence.

[158] For the aforesaid reasons, we allowed the appeal by the PP and set aside the decision of the learned judge. We find the respondent guilty as charged. Accordingly, we convicted him of the offence.

[159] Before passing sentence, we invited the respondent to make his plea in mitigation. Learned counsel Mr Karpal Singh submitted that he needed time to prepare the plea in mitigation and requested for a postponement of one week on the ground that the following Monday was the opening of Parliament and the respondent had to be present by virtue of being leader of the opposition. Then, on Tuesday there would be a debate on the King's speech. Hence Mr Karpal Singh requested for a postponement to the following Friday. This was objected to by the learned DPP. However, Mr. Karpal Singh submitted that mitigation is an integral part of the trial and the respondent ought to be given every opportunity to put up a proper plea in mitigation.

[160] Having heard the submissions, we decided against any further postponement of the appeal and we gave the respondent time of one hour to prepare his mitigation plea. We were of the view that it was more than sufficient time for the purpose.

[161] Upon resumption of proceedings, learned counsel Mr Karpal Singh informed the court that he was instructed by the respondent that the respondent suffers from high blood pressure, heart disease, spinal spondialysis and therefore learned counsel needed time to obtain a medical report to be placed before the

court for the court's consideration. Again, Mr Karpal Singh requested for a postponement of one week and told the court that there was no necessity for the proceedings to be rushed because a medical report is necessary for the purpose of sentencing and without the medical report learned counsel submitted that he would not be able to effectively put up a plea in mitigation.

[162] Learned DPP in response submitted that the prosecution was not challenging that the respondent is suffering from the ailments mentioned by learned counsel and that his medical problem is public knowledge. Therefore, learned DPP objected to any postponement.

[163] Generally, in circumstances where an accused person put up a plea that he suffers from some medical infirmities which the court ought to consider in deliberating on the sentence to be imposed, a medical report supporting the accused's assertions is necessary for the purpose of satisfying the court that the accused does in fact suffer from those medical infirmities which he claims and such infirmities ought to be considered by the court in deliberating on the sentence.

[164] Having considered that the prosecution was not challenging that the respondent suffers from the ailments mentioned by learned counsel, we were of the view that in the circumstances, a medical report was not necessary and would not deprive the respondent from making his plea. Therefore, we directed the mitigation process to be proceeded with.

[165] Learned DPP submitted that this court ought to consider the circumstances in the commission of the offence and the relationship between PW1 and the respondent at the material time. It was submitted that PW1 was only 23 years old and was the respondent's employee and the respondent was in a dominant position over PW1. It was further submitted that the offence was pre-meditated and was committed in a most irresponsible and reckless manner without having regard to the health and safety of PW1 as no condom was used. Not only did the respondent showed no remorse for the offence, but he also accused PW1 of being a liar. Learned DPP submitted that the respondent's acts of indiscretion is inconsistent with the high positions that he holds as a member of Parliament, economic adviser to the government of the state of Selangor and leader of the opposition parties. He

also has a previous conviction for corruption under s. 2(1) of the Emergency (Essential Powers) Ordinance No. 22 of 1970 for which he was sentenced to six years imprisonment. Learned DPP therefore pressed for a deterrent sentence.

Sentence

[166] Having considered the submissions put up by both parties, we imposed a sentence of five years imprisonment. In imposing the said sentence, we had taken into consideration the circumstances in the commission of the offence, the seriousness of the offence and weighed them as against public interest. We had also taken into consideration that the maximum punishment of imprisonment for this offence is 20 years and the respondent was also liable to whipping. However in view of the provisions of s. 289 of the Criminal procedure Code, the respondent was spared of the punishment of whipping. In our view, the sentence of five years' imprisonment would serve the ends of justice and is proportionate to the offence committed.

Stay

[167] Learned counsel had applied for a stay of execution of the sentence and that the respondent be granted bail pending appeal to the Federal Court. Learned DPP objected and submitted that an appeal is not a ground for a stay and that the respondent has not shown any special circumstances for him to be allowed a stay. In the interest of public order, the learned DPP urged that no stay be granted.

[168] We had given our utmost consideration on this issue and notwithstanding the objection raised by the learned DPP, we exercised our discretion and granted a stay of execution of sentence pending appeal. We granted bail in the sum of RM10,000 with one surety.